No. 177

[redacted] COMPANY, a [redacted] Corporation, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE AKRON, CANTON AND YOUNGSTOWN RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF [redacted]

STATEMENT AS TO JURISDICTION

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 7973 Court No. 1 Civil Action

McGRAW ELECTRIC COMPANY, A DELAWARE CORPORATION, ET AL.

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant,

and

INTERSTATE COMMERCE COMMISSION, THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.,

Intervening Defendants

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES—Filed May 12, 1954

In compliance with Rule 12, as amended, of the Supreme Court of the United States, plaintiffs, McGraw Electric Company, a Delaware corporation (Bussmann Manufacturing Division of McGraw Electric Company), Trico Fuse Manufacturing Company, a Wisconsin corporation, Economy Fuse and Manufacturing Co., an Illinois corporation, and Jefferson Electric Company, an Illinois corporation,

having this day presented their petition for appeal, now submit their statement, particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final decree, judgment and order of this United States District Court entered herein on April 2, 1954.

I

Opinion Below

The opinion of the three-judge district court for the Eastern District of Missouri, Eastern Division, is not yet reported. The opinion of the court dated March 19, 1954, is set forth herein in Appendix "A", and the final decree, judgment and order of the court entered April 2, 1954, is set forth herein in Appendix "B".

II

Jurisdiction

The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this cause: *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125; *El Dorado Oil Works* v. *United States*, 328 U. S. 12; *St. Louis & O'Fallon Railway Co., et al.* v. *United States*, 279 U. S. 461; *Texas & Pacific Railway Co.* v. *United States*, 289 U. S. 627; *United States* v. *Hancock Truck Lines, Inc.*, 324 U. S. 774; *New York, et al.* v. *United States*, 331 U. S. 284; *Youngstown Sheet & Tube Co.* v. *United States*, 295 U. S. 476; *Guy B. Thompson, Trustee, Missouri Pacific Railroad Co.* v. *United States*, 343 U. S.

549; *United States* v. *Great Northern Railway Co.*, 343 U. S. 562.

III

Statutes and Rules of the Interstate Commerce Commission Involved

The validity of a statute of a State, or a statute or treaty of the United States, is not involved.

The principal statutes involved are the Interstate Commerce Act and particularly Sections 1 (6), 2, 3, 4, 6 (7), 8, 9, 15 (1), 16 (1), (2), 17 (1) (3) (4) (11); the Administrative Procedure Act, 5 U. S. C. A., Sections 1004 (b) and 1009 (e), and the Rules of the Interstate Commerce Commission, 44 (a), 96 (b), 97, 98 (a), and 101 (a) following sec. 1185, Vol. 3, 49 U. S. C. A. pp. 439-481. All are set forth in Appendix "C".

Date of Decree and Date Application for Appeal Was Presented

The final decree and order sought to be reviewed was entered on April 2, 1954, and the petition for appeal and the order allowing the appeal was presented and entered on May 12, 1954.

IV

Statement

This is civil action by manufacturers and railway freight shippers of electrical fuses in large volume, filed pursuant to Title 28 U. S. C., sections 1336, 1398, 2284 and 2321 through 2325, to enjoin, set aside, annul and suspend certain orders of the Interstate Commerce Commission dismissing a complaint of these plaintiffs. The action, more specifically, seeks an order and judgment to compel the Commission to prescribe a new and proper order herein; for an order requiring the Commission to determine the

amounts of illegal freight charges exacted and collected from plaintiffs by the defendant railroads; to order reparation to plaintiffs because of the excessive freight rates charged by the carriers and paid by plaintiffs, and to set aside, enjoin, annul and suspend a new tariff schedule promulgated by the Commission affecting the commodities in question. The orders of the Commission complained of were entered in a proceeding initiated by the plaintiffs against common carrier railroads before the Commission and entitled "Bussmann Manufacturing Company Division of McGraw Electric Company, et al. v. Akron, Canton & Youngstown Railroad Company, et al.", Docket Number 29,962 and Investigation and Suspension Docket Number 5609. The opinion of the Commission is reported in 277 I. C. C. 5.

The purpose of the proceedings before the Commission was to compel the application of an exceptions rating of Class 70 on shipments, in less-than-carload lots in Official Territory, of electrical fuse plugs of the knife-blade and cartridge types.

The published tariffs of the railroads provide a classification in Official Territory (roughly that part of the United States east of the Mississippi River and north of the Ohio River to Cincinnati, thence following an irregular line to Norfolk, Virginia) for the shipment of *electrical fuse plugs, "noibn"* (i. e., not otherwise indexed or classified by name), in less-than-carload lots at a second-class rating, which means that they take a freight classification of eighty-five percent of the established first-class rate. The tariff further provides for a first-class or Class 100 rating for like shipment of *electrical fuses, noibn.* The manufacturing plants and points of shipment of each of the plaintiffs are in Official Territory.

In addition, there is in effect in Official Territory another tariff publication known as the "Exceptions to the Official

Classification", in which a Class 70 rating is published on fuse plugs, in addition to various other electrical appliances shipped in less-than-carload lots. These electrical devices on which the Class 70 rating applies for such shipments include: "Circuit Breakers"; "Cutouts", "Controllers or Parts"; "Generators or Parts"; "Motors or Parts"; "Switches and Parts"; "Transformer Parts"; and "Welders, Electric or Parts".

Under the tariffs, the railroads apply the Class 100 rating to plaintiffs' shipments of electrical fuse plugs of the knife-blade and cartridge type in less-than-carload lots in Official Territory, which means that such shipments are charged the full first-class rate, whereas like shipments of other types of fuse plugs and the parts of the electrical appliances enumerated are charged only seventy percent of the first-class rate. In all other classified railroad Territories in the United States, the Class 70 rating is given to less-than-carload shipments of electrical fuse plugs of all types.

Electrical fuses are constructed in different shapes, sizes and for different electrical loads. The three principal categories are the screw-in fuse, the cartridge type fuse and the knife-blade fuse. They are all "Cut-outs" in that they interrupt the flow of electric current when an overload occurs and they all perform this identical protective function. Their usefulness lies in preventing fires and the destruction of electrical appliances. Electric fuses form an integral and required part of the electrical appliances named to which the Class 70 rating applies.

Prior to the institution of the proceedings before the Commission, the plaintiffs requested the Central Freight Association to recommend the Class 70 rating on shipments of all types of fuses. That Association is a railroad rate-making bureau supported and maintained by all of the car-

rier railroads, defendants herein. On January 29, 1947, an elaborate and detailed report on the subject was made by a sub-committee of the Association known as the "Auxiliary Committee" to another sub-committee of the same Association known as the "General Committee" with the recommendation that the defendant railroads concur and comply with plaintiffs' request. The Auxiliary Committee made the recommendation on the basis of its conclusion that electrical fuses of all types were entitled to the Class 70 exception rating on less-than-carload lot shipments in Official Territory because all electrical fuses were in fact circuit breakers and cut-outs, and so recommended.

However, the railroad defendants concluded on February 13, 1948, not to approve these findings and recommendations but, on the contrary, to reject them. Thereupon, on April 15, 1948, plaintiffs filed their complaint before the Commission and the sixty railroad carriers, defendants herein, appeared as respondents therein. The proceedings before the Commission were submitted pursuant to its Rule 44, known as "shortened procedure", whereby the evidence is submitted wholly by written statements, affidavits, exhibits and briefs. The proceedings were assigned before an Examiner of the Commission in accordance with its usual rule.

V

Proceedings Before the Examiner

During the pendency of the proceedings before the Examiner, the railroad defendants on September 15, 1948, filed therein tariffs stating new individual and joint classifications to take effect on November 5, 1948, designed to change and restrict the description of electrical fuses to include only the screw-in shell type and thereby to restrict the lower freight rate to that type only and permitting all other types of electrical fuses to be charged at the higher rate. Upon

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plaintiffs' request on October 15, 1948, the Commission suspended the new classification schedule and placed it on its Investigation and Suspension proceedings for consideration and disposition with plaintiffs' complaint.

The Examiner found and recommended in effect:

(a) That no distinction should be made in applicable freight rates to electrical fuses of whatever type;

(b) That for freight rate purposes, the commodities were identical and synonymous;

(c) That electrical fuses were not parts of electric switches, motors or other electrical appliances;

(d) That the application of the higher freight rates complained of by plaintiffs to electrical fuses, noibn (the cartridge and knife-blade types), was unjust and unreasonable to the extent that the resulting rates and charges exceeded those based upon Class 70 exception rating on fuse plugs of the screw-in type and other electrical appliances and parts;

(e) That the assailed higher freight rates on electrical fuses, noibn, were unreasonable to the extent that they exceeded the rates applicable to the screw-in type fuse plugs, and that such assailed rates were and for the future would be unreasonable; and,

(f) That the plaintiffs made shipments of electrical fuses as alleged and paid the rail charges thereon; that plaintiffs were damaged thereby and entitled to reparation with interest in the amount of the difference between the charges collected and those which would have accrued under rates found by the Examiner to be reasonable.

Although in some other respects, unimportant here, the Examiner did not sustain plaintiffs' contentions, in the over-all conclusions of the Examiner, the greater part of plaintiffs' objectives were attained.

VI

Proceedings Before Division 3 of the Commission

Thereupon, within the time and in the manner prescribed by the Rules of the Commission (Rule 96), the plaintiffs and defendant railroads filed exceptions to the proposed report and recommendations of the Examiner, and the cause was assigned by the Commission to its Division 3. The parties, pursuant to Rule 98(a) of the Commission, made written request of the Commission for oral argument; the parties were thereafter notified by the Commission that oral argument would be granted and the cause was set by the Commission for hearing on oral argument on October 19, 1949, in Washington, D. C. On that day, Division 3, as then constituted, consisted of Commissioners Carroll Miller, J. Monroe Johnson and Hugh W. Cross. When the cause was called for oral argument before Division 3, plaintiffs and the respondent railroads were represented by their respective practitioners and counsel, who appeared in person and orally argued the cause. The only Commissioners present and in attendance to hear the oral argument were Commissioners Miller and Cross, it being announced that Commissioner Johnson was necessarily absent.

Commissioner Miller died on December 24, 1949, before a decision herein was reached by Division 3, and under date of January 5, 1950, the parties were notified by the Commission as follows:

"The above-entitled proceedings were submitted for decision upon conclusion of the argument on October 19, 1949, before Division 3, composed of Commissioners Miller, Johnson and Cross.

"This is to advise you that because of the death on December 24, 1949, of Commissioner Miller these proceedings

have been resubmitted for decision by Division 3, composed of Commissioners Patterson, Johnson and Cross."

No further oral argument was had before the newly constituted Commission.

Findings of Division 3 of the Commission

The findings and orders of the majority of Division 3 of the Commission on January 16, 1950, reversed all of the substantial recommendations of the Examiner. The effect of the orders of Division 3 was to dismiss plaintiff's complaint and to sustain all of the contentions of the railroad defendants before the Commission on the Investigation and Suspension Docket. The opinion of Division 3 which states that "the issues [before it] were argued orally", was rendered by Commissioners Patterson and Johnson, neither of whom was present at the time oral argument was had. Commissioner Cross, who was present at the oral argument, dissented in substantial part from the majority.

Plaintiffs' Exceptions to Commission's Action

The plaintiffs, within the time and in the manner allowed by law and the Rules of the Commission (Rule 101), filed their petition with the Commission for Reopening, Argument Before, and Consideration by the Entire Commission of the Report and Orders Herein. Therein, plaintiffs complained that the oral argument before Division 3 only Commissioners Miller and Cross were present; that the order of the Commission was rendered by Commissioners Patterson and Johnson, neither of whom heard the oral argument, and that Commissioner Cross who was present and heard the argument dissented in part from the majority. Plaintiffs also complained therein that the report was erroneous in substance and in law. The plaintiffs prayed that the

proceeding be re-opened for argument before, and consideration by, the entire Commission.

This petition of plaintiffs was disposed of on July 10, 1950, by the Commission by a divided vote of six to four; Commissioners Aitchison, Lee, Mahaffie, Rogers, Patterson and Mitchell voting to deny, and Commissioners Splawn, Alldredge, Cross and Knudson voting to grant reconsideration, Commissioner Johnson being absent. Thereupon, within proper time and in proper form as permitted by Rule 101 of the Commission, plaintiffs filed with the Commission on August 23, 1950, a Supplemental Petition for Reopening, Argument Before and Consideration by the Entire Commission of the Report and Orders Herein of Division 3 of January 16, 1950, asking for like reconsideration and argument before the Commission. This Supplemental Petition was denied by the Commission on January 15, 1951, and the vote of the Commissioners is not disclosed by its record.

IX

Proceedings Before the Three-Judge Statutory District Court

This action was filed in the District Court of the United States for the Eastern District of Missouri, Eastern Division, by McGraw Electric Company against the United States of America. Thereafter the three additional plaintiffs (all of whom constituted the complainants before the Commission) intervened as parties plaintiff and the Commission and the sixty railroad carriers (all of the latter being the respondents in the cause before the Commission) intervened as parties defendant. The three-judge statutory district court was convened properly by the presiding judge after the issues were joined.

The complaint and intervening complaints of plaintiffs, after setting forth thhe substantive facts, contended in

detail that the plaintiffs were not accorded a full and fair hearing before the Commission and that the procedure was inadequate, manifestly unfair and in legal effect a denial of a hearing. On the merits, the plaintiffs contended that the orders of the Commission were arbitrary and capricious; that they disregarded the evidence before the Commission; that they were based upon an erroneous, illegal and improper construction of the tariffs in issue, and that they failed to give proper effect to the express terms and conditions of the tariffs, all in violation of plaintiffs' rights under the provisions of the Interstate Commerce Act. The answers of the defendant and the intervening defendants admit certain formal allegations in the petitions but are otherwise denials of the substantive allegations of the petitions relating to the merits of the controversy.

After the issues were joined and the three-judge court constituted, the plaintiffs filed a motion for judgment on the pleadings pursuant to Rule 12 (c), and for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that the pleadings and exhibits on file disclosed that the plaintiffs had not been accorded a full and fair hearing before the Commission, the motion setting forth in detail the allegations with respect to that issue and praying for an order remanding the cause to the Commission for reconsideration and reargument. On December 31, 1952, the court consolidated the motion of plaintiffs for judgment on the pleadings or for summary judgment with the hearing on the merits and set the cause for hearing on February 27, 1953.

X

Hearing and Disposition of the Cause by the District Court

On that day, February 27, 1953 the parties appeared before the court and argued the motion of plaintiffs and the

cause upon the record of the Commission. The plaintiffs sought leave at the hearing to introduce oral testimony of a professor of electrical engineering of Washington University in order to provide additional evidence that all electrical fuses are "cutouts", and also to examine other witnesses on the procedural and substantive aspects of the cause, but upon objection of the defendants this was denied. The court determined to confine the trial to the motion, pleadings and record before it. The cause was briefed by the parties and almost thirteen months* thereafter, on March 19, 1954, the court rendered its opinion and on April 2, 1954, entered its formal judgment dismissing plaintiffs' complaint.

As the opinion of the district court discloses, it found that plaintiffs made timely and proper objection to the summary treatment accorded them by the Commission in the denial of oral argument before at least a majority of the members of Division 3 which determined the cause, but it denied plaintiffs' motion for summary judgment or judgment on the pleadings on the ground that the Commission was not required by law, 49 U. S. C. A. Section 17 (1), (3) and (4) to grant oral argument where the evidence was in documentary form and the oral argument in transcript form was before all of the members of the Commission who decided the case. It further held that the Administrative Procedure Act, 5 U. S. C. A. 1004, 1006, 1007 did "not provide the circumstances under which oral argument shall be granted, nor who shall preside at such argument".

On the merits, the district court found that the knife-blade and cartridge type fuses were not entitled to the

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* We assume the district court gave the cause due consideration but we are constrained to quote Mr. Justice Jackson, 15 F.R.D. 65, 69, wherein he remarked: "Mere time consumed is sometimes cited as proof of the care we exercise. But you know that because a case is pending a long time does not mean it is being considered all that time."

classification exception rating of Column 70, or seventy percent of First Class, basing its conclusion in the main that on the record as a whole, it could not be said that the orders of the Commission were arbitrary or capricious. The court did not pass directly upon the validity of the plaintiffs' contentions that such fuses were in any event and as a matter of law both "circuit-breakers" and "cut-outs" and therefore indisputably and inescapably entitled to the Class 70 rating as such. The court avoided meeting that issue, which would have required a judgment favorable to plaintiffs, on the asserted ground that plaintiffs had made no such contentions before the Commission or in the pleadings before the court. We believe the court was in serious error in this as the pleadings and the exhibits, we submit, will amply disclose.

The district court found that the Commission's findings were supported by substantial evidence and not unreasonable under Sections 1, 2 and 6 of the Interstate Commerce Act. It also refused to hold that the orders of the Commission were invalid as being in violation of Section 4 of the Interstate Commerce Act, the long-and-short haul provisions, although the record disclosed that the application of the ratings on "fuses, noibn" in shipments from locations in Official Territory to points beyond that Territory frequently resulted in the exaction of a higher freight charge for a shorter haul on shipments moving over the same line and in the same direction. The holding, erroneous we believe, is based upon a finding that this issue was not before the court in the pleadings or before the Commission. The court also followed the Commission in its conclusion that the long existence without complaint of a classification is persuasive of the reasonableness and ignored as did the Commission the enormous and repeated increase in freight rates over the period.

XI

The Questions Involved are Substantial

This is an important and complicated legal proceeding and both the questions of law and the economic results are substantial. Should plaintiffs prevail, they would be entitled to reparations aggregating in excess of $125,000, and would be entitled to large savings in the future. Additionally, should the result of the Commission's action be sustained a new and novel rule of administrative law would be established whereby not only the Interstate Commerce Commission but all other federal administrative agencies could refuse to accord to the parties appearing before them the basic essentials of a full and fair hearing.

Prior to the filing of this action there were four separate submissions of the substantive issues in this cause and the findings upon each differed with the other or impressive dissents were registered. The Auxiliary Committee of the Central Freight Association found and recommended wholly in favor of plaintiffs; the Examiner for the Commission made a finding and recommendation largely in favor of plaintiffs; Division 3 found wholly against plaintiffs with Commissioner Cross dissenting, and the entire Commission denied plaintiffs a rehearing and reargument by a divided vote of six to four.

There is no authority, save the opinion of the district court, so far as our thorough search has disclosed, which would declare that the procedure followed by the Commission in this cause could be sustained. The district court cited none. On the contrary, all of the authorities, every legal principle and the essentials of fair play and proper orderly procedure lead to the conclusion that the fundamental rights of plaintiffs were not observed.

It is admitted by the parties and demonstrated by the

record that at the time of the oral argument in Washington, D. C., on October 19, 1949, before Division 3, Commissioners Miller and Cross were the only Commissioners who heard the oral argument there presented; that Commissioner Miller died on December 24, 1949, before any decision was reached; that Division 3 was reconstituted on January 5, 1950, to consist of Commissioners Patterson, Johnson and Cross and the parties were notified under that date by regular mail; that the Rules of the Commission (Rules 96 and 97) provide that a party to a proceeding shall have twenty days after service of an order of the Commission within which to file exceptions; that on January 16, 1950, eleven days after the mailing of the notice and nine days after its receipt in regular course, Division 3 rendered its report, the majority being written by the two Commissioners who were not present at the oral argument with the Commissioner who did hear the oral argument dissenting in substantial part. It is further clear and so held by the district court that plaintiffs filed their timely objections to the procedure and requested the reopening and reargument of the cause before the Commission and alleged specifically the circumstances which deprived them of a full and fair hearing.

The Supreme Court of the United States and the subordinate federal courts have repeatedly held that oral argument is an important element of administrative and judicial procedure and that to make oral argument to those who are not to decide would be a vain and fruitless gesture. The district court herein held that the Interstate Commerce Act does not require the Commission to hear oral argument and that as no statute or rule demands it and procedural due process does not require it, the actions of the Commission would not be disapproved. But the district court ignored the record facts that the right to oral argument had been granted the parties and thereafter without ade-

quate notice to the parties the Commission disregarded the right previously given. The district court disregarded section 1009 (e) of the Administrative Procedure Act, 5 U. S. C. A. sec. 1009 (e), defining the scope of its review, which requires the court to hold unlawful and set aside the orders of the Commission if they were entered "without observance of procedure required by law". The district court viewed the horse chestnut and designated it a chestnut horse. *St. Joe Paper Co.*, vs. *Atlantic C. L. R. Co.*, (1954) 347 U. S. 298, 98 L. Ed. (Adv. Op.) 443, 452. In administrative proceedings of a quasi-judicial character, the rights of the parties must be protected by the rudimentary requirements of fair play and where a party has been granted a right of oral argument by an administrative body, the hearing must afford the parties the right of such argument before those who are to decide. 42 *Am. Jur.* pp., 446-451, 481.

We do not contend that the Commission must as a matter of law hear oral argument on every motion or routine petition presented to it. But this cause was not an inconsequential one, and the Commission recognized that when it set down the cause for oral argument. We submit the right to oral argument must not be spurious as it was in this cause. *Gamble-Skogmo, Inc.* v. *Federal Trade Commission* (8th Cir. 1954) 211 F. 2d (Adv. Op.) 106.

In the first Morgan case, *Morgan* v. *United States*, 298 U. S. 468, 480-481, it was held that the hearing required in the administrative process is the hearing of evidence and argument. "If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." That duty, the Court therein held, is not an impersonal obligation or one that may be performed from the record or in absentia. "It is a duty akin to that of a judge. The one

who decides must hear" [the oral argument]. A like conclusion was reached in the second *Morgan* case. *Morgan* v. *United States*, 304 U. S. 1, 18.

A pertinent analogy is *Ayrshire Collieries Corp.* v. *United States*, 331 U. S. 132, where in a three-judge district court only two of the three judges participated in the determination of the cause. The Supreme Court held that the judgment of the district court was thereby void. The Supreme Court therein did not reach the substantive issues but remanded the cause for a proper determination.

The Supreme Court has held that administrative orders, quasi-judicial in character, are void if a hearing was denied, or if that granted was inadequate or manifestly unfair. *Interstate Commerce Commission* v. *Louisville & N. R. R. Co.*, 227 U. S. 88, 91; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143-144, and that one of the essential requirements of a full hearing is adequate argument, *Akron C. & Y. R. Co.* v. *United States*, 261 U. S. 184, 200.

In *Eastland Co.* v. *Federal Communications Commission* (Ct. of App. D. C., 1937), 92 F. 2d 467, three Commissioners of the Federal Communications Commission heard the oral testimony and argument but the decision was reached by Commissioners only one of whom was present at the hearing. No motion was filed by the appellants for a rehearing before the Commission and the majority of the Court of Appeals held that such failure precluded the appellants from raising objection upon appeal. But even under such circumstances Justice Stevens in dissent said (92 F. 2d. 467, 472):

"And I think Congress meant that when the Commission, proceeding by examiner, and therefore merely reading the evidence, heard oral argument, at least a majority of the Commission that heard the oral argument must decide the

case. To make oral argument to those who are not to decide would be vain * * * ."

We submit that the views of Judge Augustus N. Hand in *Visceglia* v. *United States* (D. C. N. Y., 1938) 24 F. Supp. 355, are persuasive where in that cause the two Commissioners of the Interstate Commerce Commission who heard the oral argument joined in the majority decision, even though the third one was absent.

We submit, it is clear that plaintiffs were denied a fair hearing and deprived of that quantum of fair play required by the rulings of the Supreme Court and that the plaintiffs' motion for summary judgment or for judgment on the pleadings should have been granted. The denial of that motion presents an extremely important and substantial question of administrative law.

XII

The Questions Upon the Merits are Important and Substantial

The reviewing Court will examine the record of the proceeding before the Commission and set aside the Commission's order, if the order

(1) is found to be arbitrary, capricious or unlawful; or if it,

(2) is contrary to or in excess of statutory or constitutional power; or if it,

(3) has been rendered without recognition of proper administrative procedure in that a "fair hearing" was not accorded, or if it,

(4) is unsupported by substantial evidence, or if,

(5) there is the absence of the basic or essential findings required to support the order.

Typical of the rulings of the Supreme Court on this subject are *Interstate Commerce Commission* v. *Louisville &*

Nashville Railroad Co., 227 U. S. 88, *Interstate Commerce Commission* v. *Union Pacific Railroad Co.*, 222 U. S. 541, and *United States* v. *Interstate Commerce Commission*, 337 U. S. 426.

The district court wholly ignored the proceedings and findings prior to those of Division 3; it failed to mention and presumably attach any weight either to the report and recommendation of the Auxiliary Committee of the Central Freight Association and more importantly the report of the Examiner for the Commission who found in favor of the plaintiffs. In that respect the ruling of *Universal Camera Corp.*, v. *N. L. R. B.*, 340 U. S. 474, and the Administrative Procedure Act, par. 8 (b), 5 U. S. C. A. sec. 1007 (b) are disregarded.

The Construction of the Rate Tariffs Herein Presents a Substantial Judicial Question

If any one of the following inquiries must be answered in the affirmative, then the actions of the Commission and the district court were erroneous on the merits. These questions are:

(1) Are electrical fuses parts of electrical appliances?

(2) Are the cartridge and knife-blade types of fuses circuit-breakers or cutouts?

(3) Are the fuses in question, which must be plugged into receptacles for any use, "fuse plugs"?

This follows because as a matter of law a Class 70 rating was applicable to electrical fuses if they fell into any one or more of these enumerated categories. A finding of the Commission that words are used in a technical sense does not foreclose the court from holding that the words were used in their ordinary meaning and that the tariff description is a clear definition of the items involved. The determination of the question enumerated is a matter of law

to be determined by the courts and the refusal of the district court herein to so hold and find favorably thereon for plaintiffs presents a substantial judicial question. In *Great Northern R. Co.*, v. *Merchants Elevator Co.*, 259 U. S. 285, 292, it is held with respect to the construction of a railroad tariff: "When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law."

The construction of a railroad tariff has always been held to be a judicial question insofar as words are used in their ordinary meaning, *Standard Oil Co.*, v. *United States*, 283 U. S. 235, and previous administrative construction is not binding on the courts. *W. P. Brown & Sons Lbr. Co.*, v. *Louisville & N. R. R. Co.*, 299 U. S. 393, and when two descriptions and tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rate, *United States* v. *Gulf Refining Co.*, 268 U. S. 542.

It is manifest in this record that the tariff classifications involved in this proceeding are not so esoteric that the district court was required to defer to the Commission in the matter of interpretation of simple, non-technical words. Had the district court performed its function of interpretation, it could not have escaped a ruling in the affirmative on one, if not all of the questions posed hereinabove. In that event, it would follow as a matter of law that the plaintiffs' fuses would have been entitled to a Class 70 rating, and the Commission's orders would necessarily have to be set aside.

XIV

The Orders of the Commission are Violative of Sections 1, 2, 6 (7) of the Act

(a) *The Commission Ignored Essential Elements in the Determination of the Rating*

The record is clear that the shipments by plaintiffs of the cartridge and knife-blade types of fuses in Official Territory in less-than-carload lots are so packaged so that the shipments are easy to handle and the losses in shipments were infinitesimal. The average weight per cubic foot and value of these fuses as compared with the screw-in type vary to some extent in that the cubic foot weight is denser than the screw-in type and the values per cubic foot are accordingly higher. But the Commission itself in *Class Rate Investigation*, 262 I. C. C. 447, has held that value is a disappearing factor in the determination of the fitness and reasonableness of classification ratings and rates and that the same principles of classification should be applied in every Territory to the same article of commerce so that the same commodity would not take one rating in one Territory and a different rating in another. We have shown that in all Territories other than Official the Class 70 rating applies to the knife-blade and cartridge type fuse plugs.

The record demonstrates that under the very principles laid down by the Commission, the disputed rating was unreasonable and unjust and in violation of Section 1 of the Act and will so continue to be in the future as the Examiner properly found.

(b) *Fuses are Parts of Electrical Appliances*

It is undisputed that electrical fuses are required by the Standards of Underwriters Laboratories (which are followed universally as legal requirements for approved

installations), be used as an integral part of the electrical devices heretofore enumerated which enjoy the Class 70 exceptions rating. The fuses have no use or function except as a part of an electrical appliance. The exceptions rating include not only the electrical appliances themselves but the "parts" thereof. The application of the ratings do not call for any expertness on the part of the Commission but it is a substantial question of law for the court to determine. *United States* v. *Gulf Refining Co.*, 268 U. S. 542. The district court refused to so view its functions and abdicated its plain duty.

In *Line Material Co.*, v. *Hinchcliffe*, 43 M. C. C. 323, the Commission had before it the question as to whether the description "Transformer parts" and the rating thereunder was applicable to the description of transformer cases. There the tariff description included transformers and parts thereof, and the Commission held that transformer cases were necessary parts of transformers and fell directly within the definition of the disputed tariff. In *Norwich Wire Works, Inc.* v. *Boston & M. R.*, 299 I. C. C. 395 the Commission held that when the article is clearly embraced in the general description in an exception the rate provided in the exception is applicable, even though there may be a more specific description in the classification.

The question presented, of crucial substance, as to whether the fuses were "parts" of the electrical appliances was one wholly of law and should have been so regarded by the district court.

(c) *The Existence of a Rating for an Extensive Period Does Not Impart Validity*

The finding of the Commission and the district court of the presumption of long existence of a rating as a controlling factor to sustain its validity is in conflict with

the principles previously enunciated by the Commission. The rule is that the continuance of a given rate over a period of years without protest on the part of shippers does not justify its maintenance if the rate is unreasonable nor is the silence of a shipper over a long period of years conclusive of its reasonableness. *F. W. Tunnell & Co.*, v. *Pennsylvania Railroad Co.*, 120 I. C. C. 425; *S. Bender Iron & Supply Co.* v. *Kansas City Southern Railway Co.*, 118 I. C. C. 661. This is a sensible and practical rule. The transportation costs for the fuses in question more than doubled in some instances and all greatly increased over the years, and it was when the squeeze of the increased freight bills made itself a serious handicap to the shippers that complaint was made.

(d) *All of the Fuses Are Like Traffic; the Classifications Have Resulted in Confusion and Unjust Discrimination*

The descriptions "fuse plugs" and "fuses, noibn" as used and applied in practice by the defendant railroads in their classification and tariff schedules result in confusion and the assessment of varying rates and charges on electrical fuses all types of which constitute a like kind of traffic in violation of Sections 2 and 6 of the Act. The Commission and the district court dismissed the contention of unjust discrimination on the ground that no proof was offered in support thereof but we submit that such poof was offered in support thereof. The record is further clear, we submit, that the mis-application of classification ratings on shipments of all of the fuses have resulted in confusion, unjust discrimination and that the conclusion reached by the Commission and the district court is in violation of Sections 2 and 6 of the Interstate Commerce Act.

XV

The Effect of the Orders of the Commission is to Violate the Long-and-Short-Haul Provisions of the Interstate Commerce Act

The record shows that by the applications and ratings complained of in Official Territory a higher freight is exacted frequently by the railroads for a shorter haul than for a longer haul on shipments moving over the same line and in the same direction. The district court took the position that the contention was not made before it or before the Commission. This was done obviously in error for we submit that such a specific issue was raised before both tribunals. The Examiner considered this contention and pointed out the disparity but he did not pass upon it because his finding was favorable to plaintiffs on the issues and a finding on this point was unnecessary for his decision. Section 4 of the Interstate Commerce Act makes such rates unlawful and there was nothing in the record, we submit, of any permission by the Commission to permit the departure from the law.

Conclusion

Many of the issues here involved have never been decided by the Supreme Court and we believe that the district court has by its judgment erroneously decided this cause. Where questions presented herein have received prior consideration by the Supreme Court, we submit that the district court has decided them erroneously. The questions presented are of great importance, not only to these plaintiff's but to the general public and all persons who come before administrative tribunals. Accordingly, it is sub-

mitted that substantial questions are involved which call for appropriate exercise of appellate jurisdiction.

Respectfully submitted,

ARTHUR J. FREUND,
506 Olive Street,
St. Louis 1, Missouri,
Counsel for Appellants.

APPENDIX "A"

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

No. 7973 Court No. 1 Civil Action

McGraw Electric Company, a Delaware Corporation, et al., Plaintiffs,

vs.

United States of America, Defendant,

and

Interstate Commerce Commission, The Akron, Canton & Youngstown Railroad Company, et al., Intervening Defendants.

Appearances:

For Plaintiffs: Arthur J. Freund, of St. Louis, Mo.

For Defendant: H. G. Morison, Assistant Attorney General; Robert W. Strange and James E. Kilday, Special Assistants to Attorney General, of Washington, D. C.; and George L. Robertson, United States Attorney, of St. Louis, Mo.

For Intervening Defendant, Interstate Commerce Commission: Edward N. Reidy, Chief Counsel; and Samuel R. Howell, Assistant Chief Counsel, Interstate Commerce Commission, Washington, D. C.

For Intervening Defendant Railroads: Edward R. Gustafson and Leo P. Day, of Chicago, Illinois; and Richmond C. Coburn, of St. Louis, Mo.

Before Thomas, Circuit Judge, Moore and Harper, District Judges.

Opinion

Moore, *Judge.*

This is an action under Sections 1336, 1398, 2284 and 2321 through 2325, to enjoin, set aside, annul and suspend certain orders of the Interstate Commerce Commission (1)

and dismissing a complaint seeking the prescription of lawful rates for the future and reparations from defendant railroads on shipment of electrical fuses, and (2) discontinuing suspension of a new tariff schedule affecting the same commodities. The two proceedings were consolidated before the Commission by agreement of the parties.

We are met at the outset with plaintiff's motion for judgment on the pleadings or for summary judgment, which was consolidated before us with the hearing on the merits. This motion is on the ground that the plaintiffs had not been accorded a full and fair hearing before the Commission. This matter requires a somewhat detailed recital of the procedure in this case before the Commission. The shortened procedure was used, whereby no oral evidence was heard, but affidavits and exhibits were submitted. The parties filed their exceptions to the proposed report of the examiner, and requested oral argument before Division No. 3 of the Commission (consisting of three members). The request for oral argument was granted, and on the appointed day was heard by Commissioners Miller and Cross, after announcement that Commissioner Johnson was unavoidably absent, but would read the transcript of the argument, and would participate in the decision on the case. While the case was under submission, Commissioner Miller died, and the parties were notified that Commissioner Patterson had been appointed to take his place on Division No. 3, and that the case had been re-submitted for decision by the Division so constituted. About ten days later the Report and Opinion of Division No. 3 was announced, with a dissent, in part, by Commissioner Cross, the only member who had heard the oral argument. The plaintiffs filed original and supplemental petitions for rehearing and re-argument, which raised these matters, and both were denied by the full Commission without argument.

The defendants argue that the point is not properly raised in this court because plaintiffs failed to object to the hearing before the two commissioners, and further failed to object to the re-submission to the newly constituted division after receipt of the notice mentioned above. However, these matters were raised in the petitions for

the rehearing and re-argument before the Commission, and in view of the relatively short period of time before the announcement of its decision by the Division as reconstituted, we will assume that these matters were sufficiently raised during the administrative proceedings.

Section 17 (1) of the Interstate Commerce Act, 49 U.S.C.A., provides that the Commission may divide its members "into as many divisions (each to consist of not less than three members) as it may deem necessary * * *. When a vacancy occurs in any division, or when a commissioner because of absence or other cause is unable to serve thereon, the chairman of the Commission, or any Commissioner designated by him for that purpose, may serve temporarily on such division until the Commission otherwise orders." Section 17 (3) provides that "The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice * * *. A majority of the Commission, of a division, or of a board shall constitute a quorum for the transaction of business * * *". Under Section 17 (4) "a division * * * shall have authority to hear and determine * * * or otherwise act as to any work, business or functions assigned or referred thereto * * * and * * * shall have all the jurisdiction and powers conferred by law upon the Commission, and be subject to the same duties and obligations."

It is to be noted that no obligation was made at the oral argument to the announcement that one of the three members of the Division was absent. Plaintiffs do not now complain of this because under the statute a quorum was present, and if the majority which heard the argument had decided the case they would have no complaint. See *Visceglia* vs. *United States*, 24 F. Supp. 355, where the substitution of one member after argument before a Division consisting of three members was held not to invalidate the action of the Commission.

Plaintiffs' complaint here is that the majority which rendered the decision had not heard the oral argument, and the one member who had heard argument dissented in part.

This situation is similar in some respects to that in *Eastland Co.* vs. *Federal Communications Commission*, 92 F. 2d 467, certiorari denied 302 U.S. 735, where a Division of three commissioners heard the evidence and argument, but the decision was later rendered by the Division with the substitution of two members who had not heard the case—one member had died and the other had been transferred to another Division. The Court said, at pages 469-470:

> "No question is raised by the appellants as to lack of notice, or opportunity to present evidence and file briefs or as to the manner in which the hearing itself was conducted. The appellants were accorded ample and timely notice and a full opportunity to be heard. The commissioners who entered the decision report that they had fully considered the evidence and the entire record of the case.
>
> The contention of appellants is that they were entitled to have their case passed upon by the identical members of the Broadcasting Division who sat at the presentation of all of the evidence in the case, and that the procedure followed amounted to a denial of a lawful hearing and trial of the case, inasmuch as two members who joined in the decision did not hear the oral evidence when delivered by the witnesses in person.
>
> In our opinion the partial change in the personnel of the Division which decided the case did not invalidate its decision, for it was nevertheless the decision of the Division which acted upon the evidence."

The Court relied upon the statutes, which are substantially similar to those concerning the Interstate Commerce Commission quoted *supra*, but the Court goes on to point out the fact that no motion for rehearing was made before the Division or Commission, as was done here.

However, we believe that a full and fair hearing was granted in this case. A majority of the Division as then constituted heard the oral argument after notice to the parties that the third member was unavoidably absent and

would read the transcript of the oral argument and participate in the decision on the case. This he did, and also had all of the purely documentary evidence and written memoranda before him. Commissioner Patterson, who was substituted for Commissioner Miller, also had all of this material before him.

It is to be noted that the parties waived their right to present oral testimony and to cross-examine their adversaries' witnesses by consenting to the "shortened procedure" under the Commission's rules. Oral argument, under Rule 98 of the Commission's General Rules of Practice, following 49 U.S.C.A., is not granted as a matter of right but is discretionary with the Commission.

The Administrative Procedure Act, 5 U.S.C.A., Sections 1004, 1006 and 1007, does not provide the circumstances under which oral argument shall be granted, nor who shall preside at such argument. See *National Labor Relations Board* vs. *Stocker Mfg. Co.*, 185 F. 2d 451.

Due process of law under the Fifth Amendment does not necessarily require that oral argument be granted. In *Federal Communications Commission* vs. *W. J. R.*, 337 U.S. 265, the Court said, at page 275:

> "On the contrary, due process of law has never been a term of fixed and invariable content. This is as true with reference to oral argument as with respect to other elements of procedural due process. For this Court has held in some situations that such argument is essential to a fair hearing. Londoner v. Denver, 210 U.S. 373, in others that argument submitted in writing is sufficient, Morgan v. United States, 298 U.S. 468, 481. See also Johnson & Wimsatt v. Hazen, 69 App. D.C. 151; Mitchell vs. Reichelderfer, 61 App. D.C. 50."

See, also, *Sisto* vs. *Civil Aeronautics Board*, 179 F. 2d, 47.

As no statute or rule demands it, and procedural due process does not necessarily require it, we hold that the hearing granted in this case was reasonable and adequate where all the evidence was in documentary form, and the

oral argument in written form was before all the members of the Division who decided the case.

On the merits, this controversy involves ratings on electrical fuses. These are of three principal types: the screw-in fuse; the cartridge type fuse and the knife blade fuse. Under tariff schedules for Official Territory, there are two classifications into which fuses may fall: "Item 15890 Electric * * * fuse plugs, in barrels or boxes"; and "Item 15965 fuses, noibn[1], in barrels or boxes".

The screw-in type fuse falls into the "fuse plug" classification, and in less than carload shipments takes a rating of Class 2, but by virtue of a classification exception rating takes a rating of Column 70, or 70% of First Class. The cartridge and knife blade types have been placed into the "fuses, noibn" classification, and in less than carload shipments take a first class rating, and have no exception rating. There is also a Column 70 rating on less than carload shipments of certain electrical appliances and parts thereof, including "circuit breakers * * * cut-outs * * * controllers or parts * * * motors or parts * * * switches and parts."

The shippers contended that the rates charged on the cartridge and knife blade fuses were, are and for the future will be unreasonable, unjustly discriminatory, and inapplicable, in violation of Sections 1, 2 and 6 of the Interstate Commerce Act.

The Commission dismissed the Complaint and vacated the suspension order on the new tariff which amended the description in Item 15890 from "fuse plugs" to "screw shell type fuse plugs."

The plaintiffs claim, first, that the ratings applied to their knife-blade and cartridge type fuses are inapplicable because they should properly fall within the exceptions tariff relating to certain electrical appliances or parts mentioned above. Plaintiffs contend that the construction of the rate tariffs is purely a question of law for determination by this Court and that all ambiguities or reasonable

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[1] The word "noibn" is a coined word meaning not otherwise indexed or classified by name.

doubts as to their meaning must be resolved against the Railroad Carriers.

In this connection it is asserted that the cartridge and knife-blade types are obviously "fuse plugs" because they are "plugged" into receptacles and that they are obviously both "circuit breakers" and "cutouts" under the other exceptions tariff. The short answer to this is that the plaintiffs made no such contentions before the Commission and should not be heard to make them for the first time before this Court. *General Transportation Co.* v. *United States*, 65 F. Supp. 981, 984. Actually, the contentions are not even made in the pleadings in this Court, but are raised for the first time in the briefs. Furthermore, there is evidence placed in the record by plaintiffs that the terms are not used synonymously commercially, or in the electrical industry, but describe different types of circuit-interrupting devices.

The plaintiffs did contend before the Commission that the designation of "fuse plugs" was confusing as to whether it embraced the term "plug fuse". They also contended strenuously that the cartridge and knife-blade fuses were embraced within the terms "parts" of the electrical appliances mentioned above.

The Commission found on substantial evidence that the terms "plug fuse" and "fuse plug" are used synonymously in the electrical business to describe a fuse which is screwed into a receptacle in the manner of an electric bulb. It further found that size or composition of the base makes no difference in the description; that substitution of "screw shell type fuse plugs" for "fuse plugs" would cover the Type S fuse, which has a smaller base; and that the schedules under suspension, therefore, would be just and reasonable.

On the question of fuses as "parts" of electrical appliances, the Commission found:

> "There is nothing peculiar in the construction or use of a fuse to take it out of its own category and place it with parts of electrical appliances. It must be admitted, of course, that a fuse may be considered to be part of an electrical appliance when shipped

with, and as a part of, the appliance. However, that is not the case here. These complainants manufacture fuses and ship them in quantity as fuses. There is no showing that the fuses are shipped with, or as parts of, any electrical appliances or machinery. Similarly, there is no showing that they are manufactured to specifications for use with any particular appliance or machine.

It is apparent that these fuses are manufactured to serve a particular purpose, i.e., the protection of the circuit, the machinery or appliance, or both. As the exception item covering electrical appliances and parts does not embrace fuses, it follows that the ratings sought are not applicable thereon."

We believe that the determination of the applicable tariffs in this case is a question of law inextricably mingled with questions of fact. The determination of whether fuses are "parts" of the electrical appliances involves determination of fact, namely, the meaning of the tariff term "fuses" in ordinary industrial and commercial usage, and what is comprehended in the term "parts" of the electrical appliances. The evidence was conflicting on these issues, but our function as the reviewing Court is limited to a determination of whether the Commission's findings are supported by substantial evidence. We believe the findings are supported by substantial evidence and, therefore, cannot be upset. As was stated in *Old Colony Furniture Co.* v. *United States*, 95 F. Supp. 507, at p. 510:

"It is true that it has been frequently said that the construction of a railroad freight tariff, like that of any other document, is a question of law. But at times, as is the case here, the question of law is inextricably mingled with questions of fact. Here, as petitioners themselves contend, the words of the tariff must be given the sense which they would convey to the shipper who reads it. But this in turn requires findings of fact as to the meanings which these words have in industrial usage. Cf. Great Northern Railway v. Merchants Elevator Co. supra (259 U.S. 285).

> These latter findings of the Commission, being supported by substantial evidence, cannot be upset. In the light of these findings, the Commission's ruling as to which item of the tariff is applicable, is correct."

That case involved the question whether paint on wooden auto parts was a "preservative" or a "protective coating" under the tariffs. See, also, *Texas & Pacific Ry. Co.* vs. *American Tie & Timber Co.*, 234 U.S. 138, where the question involved whether oak cross-ties were "lumber" within the meaning of the tariff.

The plaintiffs charge that the Commission erred as a matter of law in finding that "No proof was offered in support of the allegation of unjust discrimination, which will not be further considered". It was explained in a footnote:

> "Section 2 is intended to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different freight charges therefor. See *Wight* vs. *United States*, 167 U.S. 512."

The burden of plaintiffs' contention is, apparently, that all types of fuses are "a like kind of traffic" under Section 2 of the Act, and should, therefore, come under the same classification rating. But Section 2 is not applicable in such a situation, for the reason that Section 2 was intended to enforce equality between shippers. *Wight* vs. *United States, supra*, and see, also *L. T. Barringer & Co.* v. *United States*, 319 U.S. 1, at p. 6. The finding of the Commission that no proof was offered as to preferences for other shippers is supported by the record.

We now turn to the allegation that the rating of first-class on "fuses, noibn" on shipments in less than carload lots is unreasonable under Section 1 of the Act.

The Commission found that the applicable ratings on "fuses, noibn" were not shown to have been or to be unreasonable, and based this conclusion on a number of subsidiary findings. They found that there was no proof that

the rates were unreasonable *per se*, and that the attack was directed to the proposition that the commodity had been improperly rated in the classification, which was unreasonable to the extent that it exceeds the Column 70 exception rating on fuse plugs and electrical appliances and parts; that the weights and values of the different types of fuses varied considerably; that, for example, plaintiff McGraw's fuses, noibn, ranged in weight from 49 to 62 pounds a cubic foot, and in value from 76 cents to $2 a pound, as compared with a density of 53.5 pounds a cubic foot and a value of 37 cents a pound for shipments of fuse plugs by the same company, that the Commission previously found first-class rates not unreasonable on commodities having lower values per pound than such "fuses, noibn" and similar weight densities; that motor truck competition was the motivating force in compelling the establishment in 1940 of the exceptions ratings; and that the first-class rating on fuses, noibn, had been in effect since 1930 without complaint from shippers, thus importing general satisfaction with the existing rates.

These findings and conclusions on the question of reasonableness are a matter peculiarly within the province of the Commission. The function of this Court is a limited one. It is to determine if there is in the record any rational basis for what the Commission has done. If there is, the judicial function is exhausted, and the order of the Commission must stand. *Rochester Telephone Corp* v. *United States*, 307 U.S. 125, 146. It was said in the Rochester case, at p. 140:

> "Only questions affecting constitutional power, statutory authority, and the basic requirements of proof may be raised."

The plaintiffs contend that the Commission ignored essential elements in the determination of the rating, failed to consider some of the evidence, and placed undue reliance on the questions of value and the existence of the rating for a long period.

It is alleged that the Commission ignored the fact the Column 70 exception rating is used in Southern, Western

and Western Trunk Line Territories on "fuses, noibn" and from points in Official Teritory to destinations in those Territories. However, this fact is mentioned in the report of the Commission. The contention is that the Commission failed to follow its own principles as established in the *Class Rate Investigation, 1939*, 262 I.C.C. 447, that uniformity of rates was highly desirable as between Territories.

However, it was also held in that case that the rulings on uniformity between territories were not intended to prevent exceptional classifications where required by either the Commerce Act or for commercial or competitive reasons. Since the Column 70 ratings in other territories were applied by virtue of exceptions tariffs as to which there was some evidence in the record to show they were issued to meet motor truck competition, we cannot say that the Commission ignored its own rulings or improperly applied the law.

Plaintiffs assert that the Commission stressed the element of value without taking into consideration the fact that the risk of loss was negligible on fuses of all types over a long period of years. However, the Commission mentions this fact in its report, and has indicated in the past that more significance is placed upon the value of a commodity than merely the extent to which it affects the risk of loss in transporting it. *Rubber Assn. of Am.* v. *Akron & B.B. R. Co.*, 174 I.C.C. 79, at 85.

The plaintiffs further assert that evidence as to value of other current-protective devices enjoying the 70% exception rating was ignored by the Commission. However, it is not the function of this Court to decide where the weight of the evidence lies, and what evidence shall be disregarded. *Merchants Warehouse Co.* v. *United States*, 283 U.S. 501.

The Commission has at times held that a classification which has long existed and is accorded long recognition is persuasive of its reasonableness, and at other times that such a factor is not conclusive. We cannot say as a matter of law that the Commission's reference to the long existence of the classification in this case is invalid.

The plaintiffs contend, lastly that the Commission's orders are invalid because they have the effect of violating the long-and-short-haul provisions of Sec. 4 of the Interstate Commerce Act. There is some evidence in the record that the first-class rates on "fuses, noibn" to border points in Official Territory exceeded the Column 70 exception rates to points just beyond the territorial border, although the former were generally intermediate to the latter. However, the plaintiffs made no such contention before the Commission, nor in the pleadings in this Court, and apparently relied upon the evidence only to attack the reasonableness of the first-class rate. Plaintiffs are not entitled to a trial *de novo* before the Court. *Rochester Telephone Corp.* v. *United States, supra.* Furthermore, the Commission suggests in its brief that at the time of these shipments there was in effect a Fourth Section Order of the Commission permitting such departures under the proviso of the law.

Upon the record as a whole, we cannot say that the orders of the Commission are arbitrary or capricious. They are rationally based on adequate findings and conclusions as to all the issues directed to its attention. These, in turn, find substantial support in the evidence. The plaintiff's Complaint will, therefore, be dismissed.

Dated this 19th day of March, 1954.

(Signed) SETH THOMAS,
Judge, United States Court of Appeals.
(Signed) GEORGE H. MOORE,
Judge, United States District Court.
(Signed) ROY W. HARPER,
Judge, United States District Court.

APPENDIX "B"

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

No. 7973 Court No. 1 Civil Action

McGraw Electric Company, a Delaware Corporation, et al., Plaintiffs,

vs.

United States of America, Defendant,

and

Interstate Commerce Commission, The Akron, Canton & Youngstown Railroad Company, et al., Intervening Defendants.

Before Thomas, Circuit Judge, Moore and Harper, District Judges.

Judgment

Pursuant to Opinion filed herein on March 19, 1954, it is hereby ordered, adjudged and decreed that the Plaintiffs' motion for judgment on the pleadings, or for summary judgment, be denied, and Plaintiffs' Complaint dismissed on the merits at Plaintiffs' costs.

Dated this 2nd day of April, 1954.

(Signed) Seth Thomas,
Judge, United States Court of Appeals.
(Signed) Geo. H. Moore,
Judge, United States District Court,
(Signed) Roy W. Harper,
Judge, United States District Court.

APPENDIX "C"

INTERSTATE COMMERCE ACT

Sec. 1 (6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

Sec. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Sec. 3. (1). It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to

any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Sec. 4(1). It shall be unlawful for any common carrier subject to the provisions of this chapter to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to be provisions of this chapter, but this shall not be construed as authorizing any common carrier within the terms of this chapter to charge or receive as great compensation for a shorter as for a longer distance:

Sec. 6 (7). No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Sec. 8. That in case any common carried subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act,

matter or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this part may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States or competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Sec. 15 (1). That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this

part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Sec. 16 (1). That if, after hearing on a complaint made as provided in section thirteen of this part, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

(2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission

in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

Sec. 17 (1). The Commission is authorized by its order to divide the members thereof into as many divisions (each to consist of not less than three members) as it may deem necessary, which may be changed from time to time. Such divisions shall be designated, respectively, division one, division two, and so forth, or by a term descriptive of the principal subject, work, business, or function assigned or referred to such divisions. The Commission may designate one or more of its divisions as appellate divisions. Any Commissioner may be assigned to such division or divisions as the Commission may direct, and the senior in service of the Commissioners constituting a division shall act as chairman thereof unless otherwise directed by the Commission. When a vacancy occurs in any division or when a Commissioner because of absence, or other cause, is unable to serve thereon, the Chairman of the Commission or any Commissioner designated by him for that purpose may serve temporarily on such division until the Commission otherwise orders.

(3). The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division, individual Commissioner, or board, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the Commission or any division, individual Commissioner, or board and be heard in person or by attorney. Every vote and official act of the Commission, or of any

division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested.

(4). A division, an individual Commissioner, or a board shall have authority to hear and determine, order, certify, report, or otherwise act as to any work, business, or functions assigned or referred thereto under the provisions of this section, and with respect thereto shall have all the jurisdiction and powers conferred by law upon the Commission, and be subject to the same duties and obligations.

(11). Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees.

ADMINISTRATIVE PROCEDURE ACT 5 U. S. C. A.

Sec. 1004 (b). The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

Sec. 1009 (e). So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing pro-

vided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

RULES OF THE INTERSTATE COMMERCE COMMISSION

Rule 44 (a). In shortened procedure (see rule 5 (j)), the Commission will request all the parties thereto to advise the Commission within a time to be specified by it whether they consent to presentation under shortened procedure.

(b). Within twenty days after service of the officer's report, any party may file and serve exceptions thereto and reasons in support thereof. Replies may be served and filed as provided in rule 23.

Rule 97 (a). The filing of exceptions to a recommended order operates to stay the effectiveness of the order, and thereafter decision by the Commission will be made in due course.

Rule 98 (a). If no officer's report is to be served, request for oral argument before the Commission must be made at the hearing or by letter (original only need be filed with the Commission) within ten days after the hearing. If an officer's report is to be served, the request for oral argument must be included as part of the exceptions brief or reply thereto.

Rule 101 (a). A petition seeking any change in a decision, order, or requirement of the Commission should specify whether the prayer is for reconsideration, reargument, rehearing, further hearing, modification of effective date, vacation, suspension, or otherwise.

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FILED
JUN 29 1954
HAROLD B. WILLEY, C

Number 177.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1953.

McGRAW ELECTRIC COMPANY, a Delaware Corporation, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee,

and

INTERSTATE COMMERCE COMMISSION, and THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, et al.,
Intervening Appellees.

Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division.

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM.

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BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM.

STATEMENT.

The two motions of appellees to affirm, filed under provisions of paragraph 3, Rule 12 of the Revised Rules of the Supreme Court of the United States, seek the dismissal of this appeal on the charge that the appeal presents no substantial questions.

The jurisdictional statement filed by the appellants, pursuant to Rule 12 of this Court, sets forth the principal issues involved upon which it is contended that the questions are substantial and of great public interest, and upon which we submit that this Court should note jurisdiction. There are some misconceptions of law and fact in the appellees' motions, and it is believed that the submission of this brief may be of assistance to the Court in the determination of the issues presented.

I.

When appellants consented to present the cause under "shortened procedure," they did not agree to a procedure lacking in due process and fairness.

Both motions of appellees seem to assume, where the cause was submitted to the Interstate Commerce Commission under "shortened procedure" and considered by both the Examiner and the Commission under that type of submission, that the appellants thereby waived whatever right they may have had to make oral argument before the Commission. The fallacy of that position is at once apparent. Almost every cause presented to the Commission, as this Court and the appellees know full well, is heard and reported upon initially by an Examiner designated by the Commission for that purpose.[1] Those rare instances where the Commission or one of its Divisions or individual Commissioners may hear a cause in its original stage are so rare that they may be discarded readily by this Court from consideration insofar as they affect the issues here. Almost all of the contested causes before the Commission

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[1] Sixty-seventh Annual Report of The Interstate Commerce Commission—1953, p. 92; Sixty-sixth Annual Report of The Interstate Commerce Commission—1952, p. 87. Tabulations of the character of proceedings before the Commission for the years 1949-1953, both inclusive, are charted therein.

are heard by it either upon "shortened procedure", i. e., documentary evidence, together with the Examiner's report thereon, and the exceptions thereto filed by the parties, or upon "modified procedure" where the proceeding is heard by an Examiner on written statements, oral evidence and exhibits, the report of the Examiner and the exceptions thereafter taken by the parties. In both types of procedures the cause comes before the Commission itself for hearing and determination upon a record, exceptions and briefs in comparable fashion to the presentation of a cause to this or any other appellate court.

There is nothing in the practice or rules of the Commission which indicate any other course. There would appear to be no reported rulings of either the Commission or the courts to sustain this position of appellees, if their contention is that appellants, by consenting to the "shortened procedure," waived their right to have oral argument before the same persons who would ultimately decide the case.

The appellee railroads maintain that there are certain "procedural facts which are conceded by appellants." Among the categories of such assumed facts are that all of the Commissioners who decided the case read the transcript of the oral argument, read the record, and considered the briefs and exceptions to the Examiner's report filed by the parties before it. Neither we nor the appellees have any actual knowledge as to these "facts" and cannot affirm or deny their verity. **We do know that of the three Commissioners who decided the cause only one was present at the oral argument and that he dissented from his non-hearing colleagues.** It is that circumstance upon which we predicate our contention that the procedure followed by the Commission did not accord the fair hearing required by the Due Process Clause of the Federal Constitution.

Further when the appellee railroads say that we concede that "at the time oral argument was heard, a quorum of the Division which decided the case was present," the statement can be characterized as casuistic and misleading. It is true that a quorum of the Division in which the case was lodged was present—but the issue of fair hearing in the case at bar hinges upon the **personnel** constituting the Division, and whether Due Process requires that the **personnel** of the Division who decide the case must be the same as those who heard the oral argument. On that issue the relevant and significant fact is that at the time oral argument was heard, **only one of the members** of the Division to which oral argument was presented actually participated in the decision and disposition of the case, and, even more importantly, **it was that member** who dissented from the decision of his fellow-adjucators who did not hear the oral argument. There was another member of the Division physically present at the time of oral argument, Commissioner Miller; he died prior to the time that decision was reached, and the opinion of the Division discloses affirmatively that Commissioner Miller did not participate in the order of the Division. In addition, the record discloses affirmatively that Commissioners Johnson and Patterson, who did not hear a word of the oral argument, wrote the opinion and orders of the Commission.

It is correct to state, as appellee railroads do, that there is no dispute upon the record procedural facts. The court below found properly that appellants, within the time and in the manner allowed by law and the Rules of the Commission (Rule 101), filed their objections to the manner in which the cause had been considered by the Commission and, as found by the court below, that "these matters were sufficiently raised during the administrative proceedings."

The appellees maintain that the action of the Commission in the respect complained of here received implied

approval of this Court in *Eastland Co. v. Federal Communications Commission* (Ct. of App., D. C., 1937), 92 F. 2d 467, certiorari denied, 302 U. S. 735. We referred to that decision in our jurisdictional statement. In the *Eastland* case three Commissioners of the Federal Communications Commission heard the oral testimony of the witnesses and oral argument. The Commissioners were Gary, Brown and Sykes, but the decision was rendered by Commissioners Sykes, Case and Paul. The Court of Appeals, in upholding the action of that Commission, based its decision upon the ground that the F. C. C. may, by its organic statute [47 U. S. C. A., § 409 (e)], grant a rehearing of any decision rendered by it where a motion is filed by an aggrieved party and that in the Eastland case no such motion had been filed. It was the failure of the appellants there to file such a motion that governed the disposition of that case, for the court pointed out, *supra*, 92 F. 2d 470-471:

> No motion, however, was made by appellants for a rehearing before the Division, nor before the Commission.

In the cause at bar such a motion was timely and properly made. The Eastland opinion is wholly inapposite here, except to the extent that the inference is clear that had a motion for rehearing been filed by the aggrieved party, the ruling of the court would have been the other way.

II.

The two-to-one decision where the two who decided did not hear oral argument, but the dissenter did, denies the full and fair hearing required by due process.

Appellants did not complain below or do they do so here that when Division 3 heard the exceptions to the Examiner's report only two Commissioners, Miller and

Cross, were present to hear the oral argument. Had these two Commissioners, constituting a quorum of the Division, finally determined the cause jointly, it is probable that appellants would have been precluded from a valid complaint on this score under the doctrine declared by Circuit Judge Augustus N. Hand in *Visceglia v. United States* (D. C., S. D., N. Y., 1938), 24 F. Supp. 355, 357.

The objection of appellants is based upon the record facts that at the time of the oral argument before Division 3, in Washington on October 19, 1949, Commissioners Miller and Cross were the only Commissioners who heard the oral argument; that Commissioner Miller died on December 24, 1949; that when Division 3 was re-constituted on January 5, 1950, to consist of Commissioners Patterson, Johnson and Cross, only eleven days later, and **before** appellants had a full opportunity to object to the order of re-constitution or to request re-argument before the newly constituted division, on January 16, 1950, Division 3 rendered its report, the majority opinion being written by Commissioners Patterson and Johnson, who were not present at the oral argument, with Commissioner Cross, who **did** hear the oral argument, dissenting in substantial part. As indicated, Division 3 was re-constituted without giving appellants or any of the parties the full opportunity provided in the Commission's rules to object or to request re-argument. The Commission made the order in Washington on January 5, 1950, and the parties were notified by ordinary mail, so that appellants had no actual knowledge of the order of re-constitution of the Division until January 7, 1950. Nine days later, on January 16, 1950, the opinion of Division 3 was rendered.

Rule 96[1] of the Commission provides that a party to a proceeding shall have twenty days after service of an

[1] Rule 96 (b). Within 20 days after service of the officer's report, any party may file and serve exceptions thereto and reasons in support thereof. (49 U. S. C. A., following par. 301.)

order of the Commission within which to file exceptions, and that the filing of such exceptions, Rule 97[2], operates to stay the effectiveness of the order. It is thus apparent that the time permitted by its own rules was not afforded by the Commission for appellants to except to the order of January 5, 1950, re-constituting the Commission or in the alternative to request re-argument before the members of the Division as reconstituted, including the two members who were not present at the oral argument.

Appellees attempt to persuade this Court, as they did the court below, that since the statutes give no absolute right to oral argument before the Commission, appellants may not properly appeal to the judicial conscience no matter how inadequate or unfair the proceedings were in this respect before the Commission. In this, they disregard the long history of this Court's perceptiveness as to the requirements of fair procedure in this field, as exemplified in *Interstate Commerce Commission v. Louisville & N. R. R. Co.* (1913), 227 U. S. 88, 91, wherein it is stated:

> In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; or if that granted was inadequate or manifestly unfair * * *.

A like expression of this Court is set forth in *Akron, C. & Y. R. Co. v. United States* (1923), 261 U. S. 184, 200, wherein it was said:

> A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from

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[2] The applicable part of Rule 97 is set forth in appellants' Statement as to Jurisdiction.

the standpoint of justice and law, the step to be taken.

The question of the right of the Commission to deny **any** oral argument to the parties herein is not an issue in this cause, and whether or not the right of appellants to present oral argument was merely a privilege, to be granted or withheld at will, is not a relevant consideration. Whether the Commission accorded oral argument because it recognized the importance of the substantive questions in the case or whether it did so to avoid a subsequent charge of procedural insufficiency is not disclosed by the record or important to the present issue. The fact is that the Commission, under its own rules, accorded appellants the opportunity for oral argument, and thereafter frustrated the effective exercise of that opportunity by entrusting the disposition of the cause to three members, two of whom did not hear, participate, or have the opportunity to participate in the oral argument. This was indeed a way of exalting shadow over substance.

The railroad appellees not only dispute the proposition that one who decides must actually hear the argument, but they contend in addition that if the opportunity for argument is vital to a fair hearing the necessity is met by entertaining written argument. This is indeed a constricted and provincial, if not a wholly unrealistic appraisal of the nature and function of oral argument. It presupposes that judges and administrators are constrained to sit as robots, listening but not participating, prohibited from the questions, comments or inter-play of minds of judges and counsel which are so crucial in stripping non-essentials and arriving at the quintessence. If those who are to decide do not "hear" in this sense, then the function of argument in judicial and administrative hearings over the centuries has been fruitless, if not a mockery. But the appellees' concept of argument is not

the rule in theory or practice. What lawyer has not heard appellate judges admonish the bar as to the vitality, importance, and usefulness of oral argument? What lawyer has not experienced the intellectual inquisition of an appellate court and not perceived its intense importance in the judicial process?

Surely, appellees' notion of a written argument as sufficing (even if the argument be carefully read) is not within the concept of what was said by Mr. Justice Jackson in *Land v. Dollar* (1951), 341 U. S. 737, 748, when he said:

> Even if the parties themselves are not strictly entitled to or do not want to argue this motion, I should require them to do so, for hearings are more important here for the benefit of the Court, as a protection against unwise decision than for benefit of the parties. It is the Court that is now on trial.

As we have previously made clear, appellants made timely and prompt objection to the denial of a full and fair hearing occasioned by the foregoing circumstances, and appellants did not keep their complaint as "an ace up the sleeve to be produced later" at a trial. *United States v. Bryan* (1950), 339 U. S. 323, 343-344.

It is understatement to say that the "traditional notions of fair play and substantial justice" referred to in *International Shoe Co. v. Washington* (1945), 326 U. S. 310, 316, were not observed by the Commission in this cause. The Interstate Commerce Commission is one of the oldest administrative agencies of our government. Its pattern has been followed as a model by many of the administrative agencies, both federal and state, which have been created in more recent years. The reported cases reveal no other instance in which the Commission has con-

ducted its business in the manner it adopted in the present proceeding.

The cause at bar presents a fundamental issue of fair administrative procedure which is of much interest and concern to the judiciary, to administrative agencies and to the bar throughout the nation. The failure of this Court to take jurisdiction of this cause and to require adherence to establish constitutional notions of procedural fairness will inevitably be taken as an imprimatur of laxity, if not caprice, in the administrative process. The natural momentum and tendency of such agencies as the Interstate Commerce Commission, which possess both policy-making and quasi-judicial functions, toward the confusion of those functions, with resultant injury to the subjects of their litigational jurisdiction requires an alert judiciary. This does not signify that judges should view such cases *de novo;* but the minimum task of judges is to determine that rudimentary fairness in procedure has been observed and that the agency has acted within its jurisdictional ambit. History has demonstrated that judicial inattention to these minimal standards is an invitation to administrative tyranny, if not anarchy.

The precise issue before the Court does not require the Court to determine that full opportunity for oral argument is an absolute prerequisite in all matters adjudicated by the Commission, or by other administrative agencies. Had the Commission refused any oral argument at any juncture while it possessed the case, that issue might well have been presented. Even under those circumstances—considering the significance of the substantive issues, which the Commission apparently regarded as justifying oral argument—this Court has forecast the possibility that procedural due process under appropriate circumstances may not stop short of the opportunity for oral argument. Thus in *Federal Communications Commission*

v. Station WJR (1949), 337 U. S. 276, upon which appellees place much reliance, Mr. Justice Rutledge said, l. c. 277:

> • • • we should not undertake in this case to generalize more broadly than the particular circumstances require upon when and under what circumstances procedural due process may require oral argument. That is not a matter, under our decisions, for broadside generalization and indiscriminate application. It is rather one for case-to-case determination, through which alone account may be taken of differences in the particular interests affected, circumstances involved, and procedures prescribed by Congress for dealing with them. Only thus may the judgment of Congress, expressed pursuant to its power under the Constitution to devise both judicial and administrative procedures, be taken into account. Any other approach would be, in these respects, highly abstract, indeed largely in a vacuum.

When the substantive issues presented in the present case are measured by the foregoing standards, it is believed that this Court might well rule that nothing short of an opportunity for oral argument in such a situation would satisfy the requirements of due process. Certainly, if that be true, this Court's precedents show that a mere sham or pretense of oral argument, or, as here, the granting of oral argument in form but not in substance, would not delude the Court into believing its salutary standards had been met.

III.

The failure of the court below to give any consideration to the findings of the Examiner presents a substantial question.

Subsequent to the filing of the complaint in the cause at bar, this Court held in *United States v. L. A. Tucker Truck Lines, Inc.* (1952), 344 U. S. 33, that the requirements of the Administrative Procedure Act applied to Interstate Commerce Commission proceedings despite the vigorous protests of the Commission against its being subjected to the provisions of the Act.

The Administrative Procedure Act[1], and particularly Section 11[2], contains detailed provisions designed to assure and maintain the high standard of independence and competence of examiners. There is no reason to believe that the Examiner for the Commission in the present proceeding failed to measure up to the ideals which were the objective of the Act. Apart from our natural bias for the recommendations contained in his report, that report betokens the care, thoroughness and competence which he brought to the case.

Division 3 of the Commission, however, rejected the Examiner's report by a three to one vote, and the entire Commission sustained the Division by a six to four vote. The report of the Examiner was also before the court below, both as an exhibit to appellants' complaint and as a part of the evidence in the record before the Commission. There is nothing in the opinion or findings of the court below to indicate that any attention was there given to the report of the Examiner; on the contrary, it is apparent that the court below wholly ignored the lucid and cogent

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[1] 5 U. S. C. A., sec. 1001 et seq.

[2] 5 U. S. C. A., sec. 1011. The relevant portion of this section is printed in Appendix A to this brief.

product of the Examiner's labors in determining, without any mention of the Examiner's report, that the findings of the Commission were supported by substantial evidence. In this respect the court below wholly ignored this Court's injunction in *Universal Camera Corporation v. National Labor Relations Board* (1951), 340 U. S. 474, which would have required the court below—in determining whether there was substantial evidence to support the Commission's finding or order—to consider and to accord to the findings and report of the Examiner the relevance they reasonably command. In fact, it is impossible to ascertain from a reading of the opinion of the court below that it was even aware of the existence or relevance of the Examiner's report.

It is significant to note from the record that the proceedings were before the Examiner from April 15, 1948, until May 6, 1949 (as of which date he rendered his proposed report), approximately a year, whereas the reconstituted Division 3 of the Commission reversed the Examiner within but a few days after it was assigned to consider the cause. Promptness and dispatch are ordinarily virtues in the judicial process, but the relative disparity in the care and effort between the Examiner's role and that of Division 3 does not inspire confidence that a just result coincided with a hasty one. The court below kept the cause within the judicial bosom for a respectable period, but its opinion does not indicate more than a mere rubber-stamping approval of the Commission's determination, without the careful and searching scrutiny that might well be anticipated when the issues are large and portentous.

It cannot be gainsaid that important questions of public law inhere in the case at bar for, apart from the vital question of oral argument as an attribute of fair hearing and procedural due process, a failure to review this cause

will be construed as tacit approval of the complete relegation to administrative limbo of the hitherto important role of the Examiner. If the function and significance of the Examiner[1] is to be depreciated, both in the administrative process and in the area of judicial review, it ought not be done by inaudible evaporation, but rather by a considered and articulated appraisal. The report of the Examiner in the present case was an important document, and it has been incorporated as Appendix B to this brief. A reading of that report will indicate its substantial value to a court reviewing the action of the Commission, and will further indicate that if the court below had in fact given it any consideration the lower court's result, if the same result had been reached, would have been reached with much greater difficulty and diffidence.

IV.

The Substantive Issues.

We make no further comment here as to the importance of the substantive issues which are presented by this case. Their importance is fully presented in appellants' statement on the jurisdiction, which also reflects our view that the court below in perfunctorily assenting to the opinion and orders of the Commission gave lip-service and little more to its obligation of judicial review and the character of review of the record which litigants ought to receive. Although we have confined this brief to the procedural issues presented, that concentration should not be taken to minimize the importance of the substantive issues. We have emphasized the procedural issues herein because the erroneous decision of the court below on the matter of tariff classifications, if left undisturbed, will be scarcely

[1] An extensive discussion on "The Status of the Trial Examiner in Administrative Agencies" is set forth in Vol. 66, Number 6, *Harvard Law Review* (April, 1953) 1065-1081.

more than an expensive and painful injustice to appellants and perhaps to others similarly situated.

The reverse, however, will be true if the Commission is not called to account with respect to its violation of the rules of fair administrative procedure, and more particularly with respect to the action by which it frustrated the appellants' right to argue the cause before those who were ultimately to decide it. Such procedure wholly inconsistent with any instinct or constitutional demand for fairness may—unless promptly inhibited by this Court—become a pernicious pattern, indeed a cancerous growth which will become more difficult to excise on a later day.

To emphasize thus a matter of procedure is not to exalt a choice of method or form over substance. The matter of procedure is important here because: (1) it is a matter of **fair** and constitutionally-required procedure, and (2) a sound and just disposition of this cause before the Commission may well have turned on the application of a sound and just method of procedure.

CONCLUSION.

We respectfully submit that this Court should enter its order noting probable jurisdiction of this cause so that the vital, important and substantial issues presented may be thoroughly explored and authoritatively determined. We are confident that upon an examination of the entire record by this Court, the decree of the court below will be reversed and the cause remanded.

In noting probable jurisdiction here, this Court will fulfill the profound observation of Mr. Justice Douglas in *United States v. Wunderlich* (1951), 342 U. S. 98, 101:

> Law has reached its finest moments when it has freed man from the unlimited discretion of

some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times his privacy; at times his liberty of movement; at times his freedom of thought; at times his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions.

Respectfully submitted,

ARTHUR J. FREUND,
Attorney for Appellants.

June 10, 1954.

APPENDIX A.

5 U. S. C. A., § 1011. *Administrative Procedure Act.*

Nothing in this chapter shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute, or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this chapter or the application thereof is held invalid, the remainder of this chapter or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this chapter through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly.

APPENDIX B.

INTERSTATE COMMERCE COMMISSION.

No. 29962.[1]

Bussmann Manufacturing Company Division of McGraw Electric Company et al.

v.

Akron, Canton & Youngstown Railroad Company et al.

1. Rates and ratings on fuse plugs found applicable on plug fuses.

2. Electrical fuses found not to be parts of electrical appliances. Defendant's failure to apply on shipments of fuses rates and ratings applicable to electrical appliances and parts not shown to be or to have been violative of the act.

3. Assailed rates and ratings on fuses, noibn, found to have been and to be unreasonable.

4. Proposed change in classification description of fuse plugs found just and reasonable. Suspension order vacated and proceeding discontinued.

William E. Rosenbaum for complainants.

Leo P. Day and Edward R. Gustafson for defendants.

REPORT PROPOSED BY CHARLES MANOOGIAN, EXAMINER.

The shortened procedure was followed.

By complaint filed April 15, 1948, complainants allege that the rates and charges on various types of fuses

[1] This report also embraces Investigation and Suspension Docket No. 5609, Classification Description—Electric Fuse Plugs, which by agreement will be decided on a common record with the title proceeding.

shipped in interstate commerce from Bellwood and Chicago, Ill., Milwaukee, Wis., and St. Louis, Mo., to destinations listed in Agent B. T. Jones' tariffs, I. C. C. Nos. 2447, 2448, 3425, and 3642, and in Agent R. G. Raasch's tariff, I. C. C. No. 563, were, are, and for the future will be unjust and unreasonable, unjustly discriminatory, and inapplicable in violation of sections 1, 2 and 6 of the Interstate Commerce Act. The Commission is asked to order defendants to cease and desist from continuing the alleged violations, to determine and establish lawful rates for the future, and to award reparation on shipments made during the statutory period and on shipments made pendente lite. [No. 29962, Sheet 2] Each complainant manufactures, sells, and ships in interstate commerce various types of electric fuses. Bussmann Manufacturing Company Division of McGraw Electric Company is a Delaware corporation with its principal office at Elgin, Ill., and an office and plant at St. Louis. Economy Fuse and Manufacturing Company is an Illinois corporation with its principal office and plant at Chicago. Jefferson Electric Company is also an Illinois corporation with its principal office and plant at Bellwood. Trico Fuse Manufacturing Company is a Wisconsin corporation with its principal office and plant at Milwaukee. When not referred to collectively as complainants, the individual firms will be referred to hereinafter as Bussmann, Economy, Jefferson, and Trico, respectively.

Allegations embodied in the complaint herein fall into three categories. They are:

1. That defendants' failure to accord to less-carload shipments of commodities described by complainants as plug fuses the column[2] 70 exception ratings applicable on fuse plugs results in rates and charges on plug fuses that

[2] The word "column" or "class" followed by a number indicates a corresponding percentage of first class.

are inapplicable, unreasonable, and unjustly discriminatory.

2. That defendants' failure to apply on complainants' less-carload shipments of fuses, noibn, the column 70 exception ratings applicable on electrical appliances and parts results in rates and ratings that were, are, and for the future will be inapplicable, unreasonable, and unjustly discriminatory.

3. That the application of first class ratings and rates on complainants' less-carload shipments of fuses, noibn, is unjust and unreasonable to the extent that such ratings and rates exceed the column 70 exception ratings available for shipments of fuse plugs.

Plug Fuses.

A substantial portion of complainants' testimony in this proceeding is directed to the failure of defendants to apply to shipments of plug fuses the ratings which have been published to apply on fuse plugs. Complainants argue that the use of the two terms interchangeably gives rise to confusion among shippers and consignees that can and often does result in the payment of incorrect charges. Defendants' witnesses testified, and defendants agree, that fuse plugs are plug fuses, and equally so conversely. In electrical circles no distinction is drawn in the use of the terms and none should be made in the application of carriers' tariffs.

It is apparent from the testimony of record that the terms are used synonymously to describe one and the same type of commodity, namely, a fuse which is screwed into a receptacle in the manner of an electric bulb. It may be said then that rates or ratings applicable to shipments made on one description are equally applicable to shipments made on the other description. Where that has not been done during the period and between the parties in-

volved herein, proper adjustments in the freight bills should be made. In view of the find- [No. 29962, Sheet 3] ing of applicability set forth above, no findings are necessary under other sections of the act.

Fuses as Parts of Electrical Appliances.

Complainants' second allegation is concerned with the failure of defendants to apply to shipments of fuses the column 70 rating applicable to certain types of electrical appliances and parts thereof. It is complainants' contention that fuses are integral parts of electrical appliances and therefore must be treated as such in determining the rates or ratings to be applied.

Defendants do not dispute the applicability of the item to parts of electrical appliances but deny that fuses shipped by themselves are parts of electrical appliances as contemplated by the item. They argue, and properly so, that fuses are susceptible of use in any part of an electrical circuit at any point at which the electrical power first becomes available to and including the point of final use of the power, which can be, of course, in the electrically driven machine itself. Furthermore, there are few, if any, fuses manufactured for use exclusively at any particular point in the circuit or with any particular type of machinery. Fuses of various types can be and are used interchangeably with one another in addition to being used at any point in the circuit most convenient or proper for the purpose intended.

There is nothing peculiar or singular in the construction or use of a fuse to take it out of its own category and place it with parts of electrical appliances. It must be admitted, of course, that a fuse may be considered to be a part of an electrical appliance when shipped with and as part of an appliance. However, that is not the case here. These complainants manufacture fuses and ship them in quantity as fuses. They will eventually find their way

into the hands of individuals who by the very nature of the articles may use them at any point desired in the circuit.

It is apparent then that these fuses, protective devices that they are, are in themselves electrical appliances conceived and manufactured to serve a particular purpose, i. e., the protection of the circuit, the machinery or appliance involved, or both. They operate independently of the machine which they may be expected to protect, just as the machinery operates independently of them until an over-current occurs.

The Commission should find that the assailed failure to treat and rate fuses as parts of electrical appliances has not been shown to be an unlawful practice, violative of the act.

Reasonableness of first-class rating on fuses, noibn.

Complainants' third allegation is that the application of first-class rates to fuses, noibn, moving in less-carload quantities in official territory is unjust and unreasonable to the extent that resulting rates and charges exceed those based on the column 70 exception rating on fuse plugs and electrical appliances and parts.

[No. 29962, Sheet 4] The various types of fuses or protective devices fall within one or the other of two descriptions found in the consolidated classification:

Electrical Appliances or Equipment, or Parts Named.

* * *

15890	Electrical * * * fuse plugs, noibn, in barrels or boxes.	2	30,000	R26-5-4
15965	Fuses, noibn, in barrels or boxes	1	30,000	3

The two classification entries denote the distinction which can be made for these purposes in the types of fuses

to be considered. Item 15890 applies to those fuses which are of the plug variety. They are those having screw plugs or bases, commonly known as the Edison shell or screw, which is screwed into the fuse socket or receptacle to complete the electrical circuit while providing protection. The Edison screw shell is of the same size and type as the base of the ordinary electric light bulb and fits into its socket in the same manner as do the bulbs. However, the item itself is broad enough, since it makes no use of the limiting word "Edison", to allow fuses having screw shell or bases of other sizes, which demand adapters before they can be used in the ordinary fuse socket, to be shipped under those ratings. Item 15965 applies to all other types of fuses manufactured by complainants, such as the cartridge and knife-blade varieties.

Item 4640 of Agent B. T. Jones' tariff, I. C. C. No. 3926, and item 3917 of Agent R. G. Raasch's tariff, I. C. C. No. 590, both provide exception ratings of class 70 on fuse plugs moving in or between specified territories. Similarly, item 6875 of Agent Jones' I. C. C. No. 3926 and items 3915 and 3915-A of Agent Raasch's I. C. C. No. 590, all provide column 70 ratings on less-carload shipments of certain electrical appliances and parts thereof. Among the appliances listed by name in these items are capacitors, controllers, motors, and switches. However, in the case of the latter three items fuses as such are not named.

As shown above fuses, noibn, are classified first class less-carload and third class, minimum 30,000 pounds, carload in all three major classification territories. At the same time fuse plugs (plug fuses) have been accorded a second-class rating less-carload and carload ratings of R26, fifth class, and fourth class, minimum 30,000. The carload ratings, when transposed into percentages of first class, mean that fuse plugs are classified as taking rates 55, 45, and 55 percent of first class in official, southern, and western classification territories, respectively, when

movements are made in those territories on the normal class-rate basis.

The normal class-rate basis, as distinguished from the exception-ratings or commodity-rate basis, is not used on less-carload shipments of fuses, noibn, in any classification territory other than official. Each of the other two major classification territories, southern and western, have exception ratings which have removed the application of the normal class-rate basis. Class 70 ratings are available on fuses, noibn, less-carload, from to and between points in the South and [No. 29962, Sheet 5] Southwest as well as in western trunk-line territory east of the Missouri River. Class 70 ratings also are available on less-carload shipments made from southern to official territory or from the latter area to the South and Southwest. Stated succinctly, fuses, noibn, move at first-class rates, less-carload, in official territory while enjoying exception ratings of column 70 in or to other territories. Thus the rates from certain official territory points are higher to other official territory points than to more distant points in other territorities although the official territory destinations are intermediate to the latter points.

In official territory defendants have provided an exception rating of column 70 on an extensive list of electrical appliances and parts, but singularly enough have failed to include fuses, noibn, in the list, although they have been included in the list of electrical appliances or parts which have been given an exception rating of column 40 in carloads. It might be said in this connection that the column 40 ratings for carload shipments of electrical appliances and parts is substantially lower than that available for similar shipments in the other territorities.

Defendants maintain first-class rates on shipments of fuses, noibn, less-carload, in official territory and at the same time provide column 70 exception ratings in the other

territories on similar shipments, in spite of the fact that carload shipments of fuses, electrical appliances, and parts in official territory are carried at column 40 ratings which in some instances are higher than that charged for similar shipments in other territories.

The assailed first-class rating on fuses, noibn, was appealed to the carriers' classification committee by complainants. The Auxiliary Committee of that organization recommended favorably that fuses, noibn, be added to the list of electrical appliances and parts permitted the column 70 exception rating less-carload. In spite of the recommendation of its auxiliary group, the carriers' classification committee refused to add fuses, noibn, to the list. It was after this refusal that complainants filed the instant complaint.

Witnesses for each of the complainants testified that less-carload shipments of fuses, noibn, were made in substantial quantities by all complainants. The fuses themselves are manufactured in a manner which removes the danger of damage in transit and are packed in a manner which lends itself to expeditious and safe handling. For instance, Bussmann shipped about 5 million pounds of fuses by truck and rail during the statutory period and only filed claims for damaged shipments in the amount of $28. Economy shipped about one-half million pounds in the same period and filed claims totaling less than $100 for loss and damage. Jefferson, without indicating volume of movement, showed that its claims totaled less than $750, while Trico, with shipments totaling 248,000 pounds in 2 years, had not filed any loss and damage claims.

The weighted averages of fuses shipped by complainants vary considerably. Shipments of fuses, noibn, made by Bussmann averaged 49 to 62 pounds per cubic foot, with values ranging [No. 29962, Sheet 6] from 76 cents to $2

per pound, compared to a density of 53.5 pounds per cubic foot and a value of 37 cents a pound for shipments of fuse plugs by the same company. Economy averaged $1.24 to $2.92 in pound-value and 44 to 63 pounds in weight per cubic foot for shipments of fuses, noibn, while averaging 62 cents per pound and 32 pounds per cubic foot for fuse plugs. Jefferson's averages were $2.64 per pound and 56.3 pounds per cubic foot; its fuse plugs were 63 cents per pound and 32.6 pounds to a cubic foot. Trico, with 55 to 65 pounds to a cubic foot and values of 90 cents to $1.10 per pound for fuses, noibn, shipped fuse plugs at 45 pounds to a cubic foot at an average value of 55 cents per pound.

The average price-list value for fuses manufactured and shipped by Bussmann ran from 67.6 to 88.2 cents for fuse plugs in lots of 100, while its fuses, noibn, averaged from $1 to $5. All of Trico's fuses averaged $1 to $1.98, Jefferson's averaged $2 to $7.27, and Economy's averaged $3.14 to $6.40.

The Commission should find that the assailed less-carload ratings and resultant rates on fuses, noibn, moving in official territory were unreasonable to the extent that such ratings and resultant rates exceeded those contemporaneously applicable on fuse plugs and that they are and for the future will be unreasonable to the extent that they exceed or may exceed those presently applicable on fuse plugs. The Commission should further find that complainants made shipments as described and paid or bore the transportation charges thereon; that they were damaged thereby, and are entitled to reparation, with interest, in the amount of the difference between the charges collected and those that would have accrued under the rates herein found to have been reasonable. Complainants should comply with rule 100 of the Commission's General Rules of Practice.

I. & S. Docket No. 5609.

By schedule filed to become effective November 5, 1948, respondents proposed certain changes in the wording of item 15890 of the Consolidated Freight Classification No. 18. Upon protest of the complainants in the title proceeding, hereinafter referred to as protestants, operation of the proposed classification item was suspended by the Commission to and including June 4, 1949.

Protestants are manufacturers and shippers of various types of electrical fuses which are embraced within one or the other of two classification items covering electrical fuses by name. Item 15890 provides ratings on electrical fuse plugs, among other things, and makes no other refinements in its description than is contemplated by the word "plug"; item 15965 provides ratings for fuses, noibn.

Item 15890 classifies that type of fuse which is made with a screw base or shell and screws into a fuse receptacle in the same manner as an electric light bulb screws into its socket. The classification description provided by item 15965 embraces all other types of electrical fuses such as the cartridge type and the knife-blade type. [No. 29962, Sheet 7] There are two principal types of fuse shells or fuse bases used in the manufacture of fuse plugs. One size, known as the Edison screw shell (or base), is the more common type. It is generally manufactured of brass and has the same construction and size as the brass shell found on the common household electric bulb. The other type of base used in fuse plugs is known generally as the Type S base. It is smaller than the Edison shell in diameter and therefore cannot be used in a fuse receptacle made for the Edison-sized fuse plugs without the use of an inexpensive adapter which fits into the fuse receptacle and diminishes the size of the receptacle to the size of the type S fuse.

As item 15890 of the classification now reads any plug, or screw-in, type of fuse may be shipped as a fuse plug, sometimes termed in the trade as a plug fuse. In the principal proceeding it was freely admitted by respondents that the terms fuse plugs and plug fuses were often used interchangeably and that the size of the shell had no effect on the application of item 15890. Respondents' proposed change in item 15890 would substitute for the words "electric fuse plugs" the phrase "screw shell type fuse plugs."

In spite of respondents' admission that the size or composition of a screw shell, or base, does not remove a plug-type fuse from being classified as a fuse plug, protestants contend that the proposed description will not apply on Type S fuses. Under protestants' construction of the proposed description such fuses would be automatically classified at the higher ratings published for fuses, noibn.

Protestants' contention has no basis in fact. There is nothing in the consolidated classification nor in the proposed change to limit the meaning of the words "screw shell" so as to include only metallic Edison plugs. Similarly, in both electrical and transportation circles, no distinction is made by virtue of size or composition of plug. The record is convincing that the expression "screw shell type fuse plugs" was intended to, and does, embrace all screw-in plug types of fuses.

The Commission should find that the proposed change embodied in item 15890-A, supplement 4, of the consolidated classification is just and reasonable. An order should be entered vacating the suspension order and discontinuing the investigation and suspension proceeding.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action No. 7973(1)

McGRAW ELECTRIC COMPANY, ET AL., APPELLANTS

vs.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

This is a direct appeal from the final judgment entered on April 2, 1954, by a specially constituted three-judge district court convened pursuant to 27 U.S.C. 2284, dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. Appeal was allowed on May 12, 1954, and the appeal papers were served on appellees on May 13, 1954.

Appellants filed a complaint with the Commission in April, 1948, alleging that rail rates on certain electric fuses which they manufactured

and shipped were unreasonable, unjustly discriminatory and inapplicable, and asking the Commission to prescribe lawful rates for the future and to award reparations. The gravamen of the complaint was that appellants' cartridge and knife blade type fuses had been improperly classified as "fuses, noibn" (not otherwise indexed by name) instead of as "fuse plugs," a category with lower rates. Appellants also contended that the lower rate provided in the tariffs for certain electrical appliances or parts was applicable to their fuses.

The Commission, with the consent of the parties, followed its "shortened procedure" under which all the evidence was submitted in written form, and no testimony was taken. The examiner filed a proposed report and, at the request of the parties, oral argument on exceptions thereto was had before Division 3. At the opening of the argument, it was announced that Commissioner Johnson (one of the members of the Division) was unavoidably absent, but that he would read the transcript of the argument and participate in the decision. No objection was made to this procedure, and the argument was heard by the other members of Division 3, Commissioners Miller and Cross.

While the case was under submission, Commissioner Miller died, and Commissioner Patterson was assigned to Division 3. The parties were then notified that the case had been resubmitted to the reconstituted Division. No objection was made, and shortly thereafter the Commission issued its decision.

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The Commission (*per* Division 3) found that the classification ratings of appellants' fuses had not been shown to be unreasonable, and dismissed the complaint.[1] 277 I. C. C. 5. Noting that there was no "absolute test" of the reasonableness of a rating, it pointed out that the challenged classifications had been in effect for many years without complaint, that fuses which carried the lower rate were "somewhat lighter and much less valuable" than the higher rated "fuses, noibn," and that value and weight were "important elements" in determining a reasonable classification rating (*id.*, pp. 9-10). The Commission rejected appellants' contention that their fuses should be classified as parts of electrical appliances. It held that there had been no showing that the fuses were shipped with, and as parts of, such appliances, or that they were manufactured to specification for use with particular appliances or machines. *Id.*, pp. 8-9. Finally, the Commission held that there had been no proof of unjust discrimination. *Id.*, p. 6.[2]

Appellants filed a petition for rehearing in which they raised, *inter alia*, the objection that they had been denied a fair hearing because a majority of the members of Division 3 who had decided the case had not sat at the oral argument. The full

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[1] The Commission also vacated its suspension of the railroads' proposed change in the wording of the tariff, designed to eliminate certain ambiguities.

[2] Commissioner Cross, the only Commissioner who both sat at the oral argument and participated in the decision, dissented in part.

Commission denied the petition, four Commissioners dissenting.

The district court unanimously sustained the Commission's order. On the procedural issue, the court held that appellants had had a fair hearing. The court noted that the parties had waived their right to present oral evidence and to cross-examine their adversaries' witnesses by consenting to the "shortened procedure"; that under such procedure oral argument is discretionary with the Commission; that no objection was made at the argument to the absence of one of the Commissioners; that such argument was heard by a majority of the Division; and that both the transcript of the argument and the evidence were before the members of Division 3 who decided the case.

On the merits, the court held that in this case the meaning of the tariff was a mixed question of law and fact, and that although the evidence on that issue was conflicting, the Commission's findings thereon were supported by substantial evidence. The court further held that the reasonableness of the ratings of appellants' fuses was a matter within the Commission's expert judgment, and that in exercising such judgment the Commission had not "ignored its own rulings or improperly applied the law." The court stated that the Commission had correctly held that there had been no proof of unjust discrimination, since no discrimination *between different shippers* had been shown.[3] Finally, the court held that appellants'

[3] *Wight* v. *United States*, 167 U. S. 512.

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other contentions were not properly before it because they had not been made before the Commission.

Appellants' principal contention is that they were denied a fair hearing because only one of the Commissioners who sat at the oral argument participated in the decision by Division 3. We submit, however, that the procedure in this case fully complied with the requirements of the Interstate Commerce Act, and did not abridge any of appellants' procedural rights.

Pursuant to the Commission's statutory authority to conduct its proceedings "in such manner as will best conduce to the proper dispatch of business and to the ends of justice" (Section 17 (3)), the Commission has adopted a "shortened procedure" under which all the evidence is submitted in written form and no testimony is taken. Under that procedure, which was followed in this case with appellants' consent, oral argument is allowed by the Commission as a matter of discretion. Thus, appellants would have had no due process complaint in this case if the Commission had denied the requests for oral argument and had decided the case directly on the exceptions to the examiner's report. *National Labor Relations Board* v. *Clausen*, 188 F. 2d 439 (C.A. 3), certiorari denied, 342 U.S. 868; cf. *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 275-276. Indeed, it is by no means clear that oral argument would be required in this type of case even if the shortened procedure had not been followed. *WJR* case, *supra*.

The procedure which the Commission followed in the argument and decision of this case fully complied with the Act. Section 17(3) provides that two Commissioners constitute a quorum of a division. One of the two Commissioners who heard the argument participated in the decision. The third member of Division 3, although he did not sit at the argument, read the transcript before deciding the case, and appellants did not object to his participation under those circumstances. Thus, a quorum of the Division heard argument "either by being physically present or by reading the record and transcript" "before final decision was made." *Sisto* v. *Civil Aeronautics Board*, 179 F. 2d 47, 54 (C.A.D.C.). In the *Sisto* case, the statute required the Board to "hear or receive" argument upon request of either party, and provided that three members of the Board constituted a quorum. Only two members were present at the argument, but a third participated in the decision after reading the record and transcript. The court sustained this practice against the challenge that there had been a denial of a fair hearing because a quorum had not heard the argument. If such practice is proper where the Act required argument, *a fortiori* it is proper where the grant or denial of argument is within the agency's discretion.[4] Cf. *Eastland*

[4] *Ayrshire Collieries Corp.* v. *United States*, 331 U. S., 132, cited by appellants as a "pertinent analogy," is not in point. That case held that, under the Urgent Deficiencies Act, 28 U.S.C. 2325, which required applications to enjoin Commission orders to be "heard and determined" by three judges, a judgment based on a determination by only two judges (after

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Co. v. *Federal Communications Commission,* 92 F. 2d 467 (C.A.D.C.), certiorari denied, 302 U.S. 735.

On the substantive issues of the case, appellants make a number of arguments as to why the Commission erred in holding that the classification of their fuses as "fuse plugs" instead of as "fuses, noibn" was proper. These arguments were fully considered and rejected in the careful opinion of the district court, and they present no question of sufficient substance to justify further review by this Court.

Thus, appellants contend that the district court erred in holding that construction of the tariffs in question presented a mixed question of law and fact upon which the Commission's findings were conclusive if supported by substantial evidence, rather than a question of law which the district court itself should have decided *de novo.* While construction of a tariff sometimes may present only a question of law, see *Standard Oil Co.* v. *United States,* 283 U. S. 235, 238, the meaning of technical and industrial terms, such as the electrical terms involved in the instant case, frequently presents questions of law and fact which are "inextricably mixed." *Old Colony Furniture Co.* v. *United States,* 95 F. Supp. 507, 510 (D. Mass.); *Texas & P. Ry. Co.* v. *American Tie & Timber Co.,* 234 U. S. 138; *Standard Oil* case, *supra,* p. 239.

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a hearing before three) was void. In reaching this conclusion, the Court termed it "significant" that the Act made "no provision for a quorum of less than three judges" (p. 138). In the instant case, on the other hand, the Act specifically provides for a quorum of two Commissioners.

Appellants make a number of attacks on the evidentiary basis of the Commission's findings. These are fully answered by the district court. Appellants also again raise several issues which the district court properly refused to consider because they had not been presented initially to the Commission. *General Transp. Co.* v. *United States*, 65 F. Supp. 981, 984 (D. Mass.), affirmed, 329 U. S. 668.

For the foregoing reasons, we submit that this appeal presents no substantial question. The judgment of the district court should therefore be affirmed.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General,

EDWARD M. REIDY,
Chief Counsel,
Interstate Commerce Commission.

MAY, 1954.

CERTIFICATE OF SERVICE

I certify that I have this date served copies of the attached Motion to Affirm upon Arthur J. Freund, 506 Olive Street, St. Louis 1, Missouri, counsel for appellants, and upon Edward R. Gustafson and Leo P. Day, 652 Union Station, Chicago 6, Illinois, and Richmond C. Coburn, Ambassador Building, St. Louis 1, Missouri, counsel for appellees The Akron, Canton &

Youngstown Railroad Company *et al.*, by causing copies thereof to be mailed to them at their respective addresses.

DANIEL M. FRIEDMAN,
Special Assistant to
the Attorney General.

MAY 26, 1954.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No Docket Assigned on Appeal

Civil Action No. 7973(1) in The United States District Court for the Eastern District of Missouri, Eastern Division.

McGRAW ELECTRIC COMPANY, A CORPORATION,
Appellant

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE AKRON, CANTON AND YOUNGSTOWN RAILROAD COMPANY, ET AL.

MOTION OF AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL. TO AFFIRM—Filed May 28, 1954

Appellees, Intervening Defendant Railroads, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the order of the District Court be affirmed.

This is a direct appeal from the final decree entered April 2, 1954, by a District Court of three judges specially constituted pursuant to 28 U. S. C. sec. 2284, dismissing appellants' complaint which sought to set aside an order made

by the Interstate Commerce Commission. Appeal was allowed May 12, 1954, and appeal papers were served May 13, 1954.

Appellants' Statement as to jursidiction indicates that this proceeding involves two primary issues: (1) Were complainants deprived of a full and fair hearing before the Interstate Commerce Commission, and (2) Are the Commission's findings supported by substantial evidence?

These questions were given full consideration by the District Court, which decided against appellants. In making its determinations the District Court was clearly right.

It is submitted that the appeal presents no substantial questions, and that the order of the District Court should be affirmed without argument.

I. No Substantial Question Concerning the Right to Full Hearing Is Here Presented

Appellants' contention that a full and fair hearing was not accorded rests solely upon the fact that two of the three Commissioners who decided the case had not heard the oral argument. On the other hand, arrayed against this alleged irregularity we have the following procedural facts which are conceded by appellants.

(a) All of the Commissioners who decided the case read the transcript of oral argument.

(b) All of the Commissioners who decided the case read and considered the various evidence and testimony which had been presented in written form under the shortened procedure pursuant to Rule 44 of the Commission's General Rules of Practice.

(c) All of the Commissioners who decided the case had read and considered the briefs and exceptions to the Examiner's report filed by both appellants and appellees.

(d) Oral argument in such proceeding is not a right provided by statute.

(e) Oral argument in such proceeding is provided for in Rule 98 of the Commission's Rules of Practice, not as a right which the parties may assert, but as a privilege which the Commission may grant in its discretion.

(f) At the time oral argument was heard, a quorum of the Division which decided the case was present.

(g) The full Commission considered both appellants' petition for reopening and reconsideration, as well as its supplemental petition for reopening and reconsideration, and that thereafter it denied both petitions.

There is no dispute concerning the procedural facts which have been outlined above. In the light thereof it is submitted that the alleged irregularity was harmless and did not result in the denial of a full and fair hearing within the meaning of the due process clause of the Constitution or of the applicable provisions of the Interstate Commerce Act.

It is submitted that appellants contention in this respect, although not frivolous, is nevertheless lacking in any essential merit. That the issue is not a substantial one is demonstrated by the following.

A. *The cases relied upon by appellant are clearly inapposite*

On pages 16 and 17 of appellants' Statement as to Jurisdiction the case of *Morgan* v. *United States*, 298 U. S. 468 is quoted, at pages 480-481, as follows:

> "The one who decides must hear" [the oral argument]

The material appearing within the square parenthesis is appellants' interpolation. Thereby appellants seek to make the *Morgan* case stand for the proposition that the one de-

ciding the administrative proceeding must hear the oral argument.

Appellees herein assert that the *Morgan* case clearly does not establish such proposition. Appellants assertion to the contrary is based upon a kind of play on words. This is accomplished by attempting to attach to the word "hearing" purely aural connotations. As a result, in appellants terms the verb "to hear" is no broader in meaning and implication than the verb "to listen". Appellants thus modulate to the position that "to hear argument" means "to hear oral argument."

That this is a wholly specious proposition can be seen by only a cursory examination of the *Morgan* case. For there the question presented was whether a full hearing was accorded where the administrative officer promulgating a rate order did so without having heard either the oral arguments or having read the written arguments (briefs), and without having heard or read any of the evidence.

Obviously, there was a situation which, with regard to the improprieties involved, far surpasses the instant one. That case does make clear, however, that the concept of "hearing" is not exclusively an aural one. Rather it is a concept embodying the entire process of presentation of evidence and argument, both oral and written, as well as the consideration of that evidence and argument by the hearing officer. Thus this Court said at pages 480-481

> The "hearing" is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is clear that the hearing has not been given.

It is thus clear that when this Court said that "The one who decides must hear", it was not saying that the one who decides must listen to oral argument. Rather this Court

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meant that the one who decides must consider the evidence and argument which has been presented.

It is thus clear that the *Morgan* case does not stand for the proposition which appellants here assert, namely, that oral argument must be considered aurally by the hearing officer.

The appellants also cite the so-called second *Morgan* case. *Morgan* v. *United States*, 304 U. S. 1, 18. A reading of this case, however, reveals that it was solely concerned with whether a fair hearing required that each adverse party be apprised of the charges and contentions of the other. The case had nothing to do with oral argument.

Next appellants refer, as a "pertinent analogy", to *Ayrshire Collieries Corp* v. *United States*, 331 U. S. 132. In this case only two of the three judges in a three-judge district court participated in the determination of the cause. This Court held that participation of all three judges was necessary.

These facts alone demonstrate the lack of analogy between that case and the instant one. For here there was full participation by all members of the Division in the case except for the fact that two Commissioners read the transcript of oral argument rather than listened to the oral argument. In the *Ayrshire* case, however, the third judge had not participated in any part of the proceeding.

Moreover, in the *Ayrshire* case no provision was made in the statute that a quorum of less than three judges might determine the case. The absence of such provision strongly suggested the necessity of participation by all three judges in the decision. The question whether oral argument, aurally considered by all members of the court, was necessary to a full hearing was not discussed.

These cases then do not afford the slightest support for the contention here advanced by appellants.

In addition, however, appellants refer to a statement continued in the dissenting opinion in *Eastland Co.* v. *Federal Communications Commission*, 92 F. (2d) 467, 472. This statement reads as follows (page 472):

> "And I think Congress meant that when the Commission, proceeding by examiner, and therefore merely reading the evidence, heard oral argument, at least a majority of the Commission that heard the oral argument must decide the case. To make oral argument to those who are not to decide would be vain * * *."

This statement is not relevant to the issues here involved. In the first place the Commission did not proceed by examiner in the *Eastland* case. Consequently, the dissenting judge's remark is purely an aside. Moreover, in making this statement the dissenting judge relied upon a specific statutory provision providing that "In all cases heard by our examiner the Commission shall hear oral arguments on the request of either party."

In other words at the time of this case oral argument was made mandatory by statute in proceedings, before the Federal Communications Commission. With respect to the case here on appeal, however, oral argument is provided for only by Commission rule. Moreover, under such rule litigants do not have the unqualified right to argument; the rule instead confers a privilege, the granting of which is dependent upon the discretion of the Commission.

Consequently, the statements of associate justice Stephens, regardless of their cogency as regards the case with which he was concerned, have no relevance whatsoever to the case here on appeal. It is clear therefore that the cases relied upon by appellants are not opposite to the issues here presented.

B. *The issue here presented has been decided adversely to appellants' contentions*

It is the position of these appellees that the issue here presented has been decided by the case of *Eastland Co.* v. *Federal Communications Commission*, 92 F(2d) 467, certiorari denied 302 U. S. 735.

In this case it was contended that an order and decision of a division of the Federal Communications Commission was invalid because two of the three Commissioners deciding the case had not heard the oral evidence, although they had seen and considered stenographic reports of that testimony as well as copies of the written evidence. The court held that under these circumstances the decision was not invalidated. As an additional ground for denying the appeal the court referred to the fact that appellant had failed to raise the point on petition for reconsideration.

It follows from this case that if the fact that a majority of an administrative tribunal need not hear the oral testimony, of even less importance is the fact that a majority did not hear the oral argument. For in the case of testimony it can be said to be important for the hearing officers to actually hear and see the witnesses in order to to properly assess their credibility—which often depends upon subtle aspects of demeanor and manner of testifying. See *United States ex rel. Chin Cheung Nai* v. *Corsi*, 55 F. (2d) 360, 361.

But although demeanor and manner of speech may be important in the case of a witness giving testimony, they can hardly be said to be important in the case of counsel presenting oral argument. With all deference it is submitted that failure of the administrative officers to observe counsel's gesticulations or to hear his eloquence in his own cause, hardly presents a question of due process.

If the *Eastland* case is correct, *a fortiori*, the instant case is correct. Certiorari was denied in the *Eastland* case.

C. *The failure to hear oral argument is unimportant in the light of the full hearing otherwise accorded*

It has been demonstrated above that appellants have failed to cite any case sufficiently apposite to even suggest that, under the facts here involved, a full and fair hearing was denied. On the other hand the case of *Eastland Co* v. *Federal Communications*, 92 F(2d) 467, is clearly apposite. If that case is correct, then, *a fortiori* appellants' position here is without merit.

Quite apart from precedent, however, it should be apparent that no substantial question concerning the denial of full hearing is here involved. For, as above demonstrated, the hearing accorded appellants was, with the exception complained of, as full and complete as was possible under the current rules of Commission practice. That is, all of the members of the Division deciding the case read and considered not only the written evidence and testimony, but, in addition, considered three separate arguments presented by complainant. These arguments were

(a) The argument included as part of appellants' original statement under the shortened procedure

(b) The argument included in appellants' exceptions to the examiner's proposed report.

(c) The written transcript of oral argument.

In addition, the full commission gave consideration to the arguments of appellants as presented in two separate petitions for reconsideration.

In view, therefore, of the fact that all of the evidence and testimony was presented and considered in a manner not complained of, and in view of the fact that extensive arguments were presented and considered in written form, the matter here complained of becomes slight and unimportant in the perspective of the whole proceeding. So con-

sidered, it is at most an irregularity that cannot be said to have had any substantial effect upon appellants' rights. It cannot, therefore, be seriously contended that the deficiency complained of violates current concepts of due process.

The question presented to the court, therefore, is not substantial.

II. Whether the Findings of the Commission Are Supported by the Evidence Does Not Present a Substantial Question

Appellants here seem to argue that the District Court erred in not finding that the Commission wrongly decided the questions presented under sections 1, 2, and 6 of the Interstate Commerce Act. In addition, appellants contend that the District Court erred in failing to consider *de novo* the issue, under section 6 of the Act, of the applicable tariff designation to be applied to the commodity involved.

Appellees submit that no substantial question is here presented.

A. *The District Court did not err in failing to consider de novo the question of the applicable tariff rating*

Appellants' argument here is that the tariff terms involved are not used in a technical sense and that therefore the proper tariff description is a matter of law which the District Court should have determined. Appellants in support of their position cite *Brown & Sons* v. *Louisville & N. R. Co.*, 299 U. S. 393, 398-399; *Standard Oil Co.* v. *United States*, 383 U. S. 235, 238, 239.

Appellants' position is not well taken. The issue involved in the last cited cases was whether the Commission had primary jurisdiction; that is, whether the case involved matters so technical in nature that a preliminary determina-

tion must be made by the Commission. The rule referred to in these cases is that if the issue involves an enquiry which is like that commonly made by courts when called on to construe and apply any other document, the matter may be raised in an action at law without primary resort to the Commission. On the other hand where there is involved consideration of matters requiring expert knowledge for the ascertainment of the technical meanings of words, preliminary resort must be had to the Commission. This is the doctrine of primary jurisdiction.

On the other hand, if preliminary resort has been had to the Commission, *regardless of whether such preliminary resort was necessary*, the District Court may not consider, *de novo*, any matter decided by the Commission, irrespective of whether it involves the application of expert knowledge to the meaning of words. *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 277; *Tagg Brothers & Moorehead* v. *United States*, 280 U. S. 420, 443-5.

In other words, proceedings under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission are proceedings for judicial review and involve, apart from errors of law, only the question of whether the administrative findings and conclusions are supported by substantial evidence, regardless of whether the courts would themselves reach the same conclusions. *I. C. C.* v. *Union Pacific R. Co.*, 222 U. S. 547-548.

The function of the reviewing court is well stated in *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, wherein the court said (at page 287)

> The judicial function is exhausted when there is found to be a rational basis for the conclusions of the administrative body.

It is only necessary that the findings of the Commission be supported by substantial evidence. *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501.

B. *The issue of applicability here involved is not solely a question of law*

It is true, of course, that the District Court, in exercising its reviewing function, might properly consider whether the Commission committed any error of law. Appellants contend that the issue of applicability of the assessed rating involves only a construction of the tariffs. It is said that such construction is no different than the construction of a contract and has always been considered to be a legal question.

Appellants are in error. For this issue herein does not involve merely an interpretation of a tariff. It, in addition, involves certain determinations of fact, namely, the meaning of the tariff term "fuses" in ordinary industrial and commercial usage, as well as a determination of what is comprehended in the designation "parts" of various electrical machinery. The issue thus involves questions of law and fact "inextricably intermingled."

The issue is similar to that in *Old Colony Furniture Co.* v. *United States*, 95 F. Supp. 507 (D. C. Mass., 1951) one of the few cases involving the appeal of an order denying reparation. This case involved the question (as does the instant case) of which of two tariff items was applicable to the shipments in question. Briefly, the question resolved itself into whether the paint on the objects shipped was a "preservative" or a "protective coating."

With respect to scope of review to be accorded this question the court said (at page 510):

> (5) It is true that it has been frequently said that the construction of a railroad freight tariff, like that

> of any other document, is a question of law. But at times, as is the case here, the question of law is inextricably mingled with questions of fact. Here as petitioners themselves contend, the words of the tariff must be given the sense which they would convey to the shipper who reads it. But this in turn requires findings of fact as to the meanings which these words have in industrial usage. Cf. *Great Northern Railway Co.* v. *Merchants Elevator Co.*, supra. These latter findings of the Commission, being supported by substantial evidence, cannot be upset. In the light of these findings, the Commission's ruling as to which item of the tariff is applicable is correct. (emphasis supplied)

Here also the function of this Court is to determine whether the Commission's findings are supported by substantial evidence. In the instant case the fact issue is the meaning of the term "fuses". Are they "parts" of electrical appliances? The Commission held in the negative. It did so on the basis of substantial evidence as to the meaning of this term in the electrical industry. As indicated in the *Old Colony* case, supra, its finding therefore cannot be upset.

The distinction made by the Court in the *Old Colony* case is fundamental in the law. No better statement of the distinction can be found than that given by Justice Brandeis in *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 292, 66 L. Ed. 943, 947:

> "When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law. But words are used sometimes in a peculiar meaning. The extrinsic evidence may be necessary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed. Or extrinsic evidence may be necessary to establish a usage of trade or locality which attaches provisions not expressed in the language of the instrument. Where such a situation arises, and the peculiar meaning of words,

> or the existence of a usage, is proved by evidence, the function of construction is necessarily preceded by the determination of the matter of fact. Where the controversy over the writing arises in a case which is being tried before a jury, the decision of the question of fact is left to the jury, with instructions from the court as to how the document shall be construed if the jury finds that the alleged peculiar meaning or usage is established. But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the language,—a question of law,—but upon whether or not a particular judge or jury had found, as a fact that the words of the document were used in the peculiar sense attributed to them or that a particular usage existed. (emphasis supplied)

See also *Texas & Pacific Ry. Co.* v. *American Tie & Timber Co.* 234 U. S. 138, 58 L. Ed. 1255, wherein the Court held that the question of whether oak cross-ties were "lumber" within the meaning of the tariff item naming rates on the latter commodity involved the primary jurisdiction of the Commission. The necessity for such primary resort to the Commission was emphasized by the "conflict and confusion in the testimony concerning whether cross-ties were included in the filed lumber tariff." See also *Standard Oil* v. *United States*, 283 U. S. 235, 75 L. Ed. 999.

The issue in the instant case under the section 6 allegation involves a determination of the meaning of the terms "fuse" and "parts" of electrical appliances.

Since these issues are factual and since the evidence concerning them is conflicting, review must be limited to a consideration of whether the Commission's finding on the law-fact issue is supported by substantial evidence.

C. *The Commission's findings under sections 1, 2, and 6 of the Interstate Commerce Act are supported by substantial evidence*

It has been shown above that the review of the findings of the Commission under section 6 of the Act is limited, as is review of the findings under sections 1 and 2, to the question of whether there is a rational basis for those findings—irrespective of whether the Court, if it were exercising the functions of the Commission, would have reached the same result. Such question is basically one of whether the Commission's findings are supported by substantial evidence. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 235 146, 83 L. Ed. 1147, 1161; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286, 287, 78 L. Ed. 1260, 1264, 1265; *Swayne & Hoyt* v. *United States*, 300 U. S. 297, 303, 81 L. Ed. 659, 664.

Appellees do not believe that any useful purpose would be achieved by burdening this motion with detailed citation of the evidence supporting the Commission's findings. Such evidence has been referred to in detail by both the Commission and the District Court in their respective decisions. There can be no serious question concerning the adequacy of the evidence, and, because there is not, there is no substantial question presented under this heading.

Conclusion

For the foregoing reasons it is clear that this appeal presents no substantial questions. It is submitted therefore that the order of the District Court dismissing the complaint should be affirmed.

Respectfully submitted,

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(6764)

No. 177. McGraw Electric Co. et al. *v.* United States et al. Appeal from the United States District Court for the Eastern District of Missouri. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Arthur J. Freund* for appellants. *Solicitor General Sobeloff* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; and *Leo P. Day* and *Richmond C. Coburn* for the Akron, Canton & Youngstown Railroad Co. et al., appellees. Reported below: 120 F. Supp. 354.